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May 5 1871

A
GENERAL ABRIDGMENT

OF

Law and Equity,

ALPHABETICALLY DIGESTED UNDER
PROPER TITLES;

WITH NOTES AND REFERENCES
TO THE WHOLE.

BY CHARLES VINER, Esq.
FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY
OF OXFORD.

FAVENTE DEO.

THE SECOND EDITION.

C L

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OF THE

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and Subdivisions.

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Stocks.

(A) Cases relating to Stocks in Companies.

1. *Administrator durante minore etate sells the infant's stock in the East-India Company to B. and C. two members of the said company, who had notice that it was not the administrator's estate, as appears by the entries in the company's books; decreed, that it was fraudulent, and an account to be taken. Fin. R. 298. Pasch. 29 Car. 2. Munn and Brown v. East-India Company, Dunkin & al'.*

Carth. 468.
S. C.

A. in confi-
deration of
not paid
by B.
affirmed,
the 29th 20
16

day, for the term of months, to be paid to the said B. and C. the sum of £1000.

For which the said B. and C. have given security to the said day of the next term of the said court.

was, Whether this contract, made 29 Oct. 1696, by which B. had time to request the assignment of the Bank stock till 20 May 1697, was within the statute, and made void thereby? The court delivered no opinion, but Northey argued that it was not; for this is not a contract, which by the tenor of it is to be performed after the 10th day of May 1697; for although the plaintiff had liberty to perform the request of the assignment of the Bank-stock to him until the 10th day of May 1697, which was 9 days after the act took place, yet such request might be made before the 1st of May, and so the contract, by the tenor of it, was not to be performed after the 1st day of May; for a contract to be performed after the 1st day of May, is intendable of such a contract which of necessity ought to be performed after that day, and cannot be performed before; but a contract performable as well before as after that day, at the election of the party, is not within the act of parliament, but is *casus omissus*; and he compared it to a case upon the statute of 29 Car. 2. cap. 3. of frauds and perjuries, by which it is enacted, that no action shall be brought, &c. whereby to charge any person, &c. upon any agreement which is not to be performed within a year from the making thereof, unless the agreement be in writing; and an action was brought, upon an agreement by the defendant to pay so much upon his marriage, but without any writing or memorandum of the agreement; and the defendant did not marry within the year: upon the trial at Guildhall before Holt Ch. J. he was in doubt whether that agreement was within the statute, and whether it ought not to have been by writing? And ordered that the opinion of the judges of the court should be taken. And by the major part of the judges in B. R. it was resolved, that this was *casus omissus*; for that the defendant might have married within the year; and so it was not an agreement which was not to be performed within a year, and by consequence was not such an agreement as was intended by the act of parliament: and he said he did not see any diversity between the cases. Comyns's Rep. 49, 50. pl. 32. Hill. 9 W. 3. in B. R. Anon. ———— Ld. Raym. Rep. 316, 317. Smith v Westall, 5 and the contract being pleaded the a

In assumption agreement in so much *speci* averred, that cap. 32. against the said act, But per Holt quest was before Rep. 673, 6

* [2]

f May, he con- appeared he had

upon an transfer and king, within

the re- Raym-

t, A. id B. 1, A. 695, upon, that Eng- days 1 the ended ne to B. , had . de- is ill, No- the

contract within the time; for the covenant was not, that he should transfer any particular 1000 l. of Bank stock, which he had at the time of the covenant, but any 1000 l. of it. But then the whole Court held, 1st, That this action will not lie for the plaintiff in this case, because it appears that he has not transferred; and without transfer, B. is not bound to pay the money; for the money

money was to be paid upon the transfer : and therefore no transfer, no money. And cited Co. Litt. 304. Dyer, 371. 2 Mod. 266. OTWAY v. HOLDIPS. But the matter in the declaration might have been a good excuse for the plaintiff, if the defendant had sued him for not transferring the Bank stock ; or the plaintiff might have assigned his breach in the non-acceptance of the stock by the defendant. Ld. Raym. Rep. 440. Pasch. 11 W. 3. Shales v. Seignoret.

6. The Court held also, that it did *not appear* to them *but that the Bank stock was transferrable at another place than at the office of the Bank ;* for though the *act* says, *that no transfer shall be but as the king shall appoint, and the king has appointed it to be at the office of the Bank, and not in any other place,* yet that *ought to have been pleaded,* or otherwise the Court cannot take notice of it ; and therefore, notwithstanding any thing that appears here to the contrary, the transfer might have been in any other place, and then a tender

though cesty que trust forbid his doing it. On a bill by the trustee to be repaid this 10 l. per cent, Ld. C. King decreed it accordingly, with interest and costs. 2 Wms.'s Rep. 453. Pasch. 1728. Balch v. Hyham.

But if the cesty que trust had not only forbid the payment, but had also offered security to indemnify the trustee, it had been material; but the trustee had good reason to think he was liable to pay the whole money borrowed. Per Ld. C. King. Ibid. 455. S. C.

* [4]

The condition of a bond was, Whereas P. B. executor of F. B. being possessed of 4000 l. lottery annuities, 6th July, agreed to sell them for

11. By 7 Geo. 1. stat. 2. par. 8. Every contract for the sale or purchase of subscriptions or stock of the South-Sea company, &c. which shall not be compounded by the parties thereto, or interested therein, on or before the 29th of September 1721, or an abstract or memorial thereof signed by the party interested therein, and who shall be minded to take advantage of the same, shall be entered and registered in books, which are thereby required to be provided for that purpose by the respective companies to whose capital such stock, &c. do or shall relate, before the 1st of November 1721. And in default of such entry and register, every such contract, as to so much as shall remain unperformed and not com-

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and register, that the defendant might know who had a demand upon him; which in this case the defendant did, the inure contract being registered; and by the import of the deed it appears to be for the plaintiff's benefit. And of that opinion was the Court; and Raymond J. said, that this act being *ex facie*, the construction of the words ought not to be strained, in order to defeat a contract, to the benefit whereof the party was well intitled at the time the contract was made. Judgment was given for the plaintiff. 2 Ld. Raym. Rep. 1350, &c. Easter, 10 Geo. Wilkinson v. Sir Peter Meyer. ——— S. C. 8 Mod. 272. says, that by 3 Judges against the Ch. Justice, this was held to be a good contract, and well entered in the S. S. books; for the whole agreement was registered, and by consequence it must be shewed who had a right to demand the money; that the *intent of the legislature was only to show, that there was a good and solemn contract*, so that people might not be troubled with every trifling bargain made at that time, but only upon legal contracts, which were to be registered; and what was done by the plaintiff, shews that this contract was for his benefit, and that he is the person that had the right. Judgment for the plaintiff.

12. In *assumpsit* for 580 l. for 10 shares in the stock of the company of copper-mines, the defendant pleaded non assumpsit. Upon the trial there was proof of a contract, according to the declaration, but there was *no memorandum in writing, nor any earnest paid*,

In this case was cited by Serjeant Comyns, Arg. the case of

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15. *Cashier of S. S. company received money for a subscription, but did not enter respondents names in the book; the respondents recovered the money against the company.* MS. Tab. tit. Stocks, pl. 1. cites March 6, 1722. *S. S. Company v. Curson.*

16. Chancery will compel or supply the want of a *transfer of stock.* Per Parker C. 10 Mod. 498. Trin. 8 Geo. 1. *Cock v. Goodfellow.*

Judgment
affirmed in
Cam.
Scacc. Ibid.
206.—This
case was
compared to
2 Saik. 623.
Lancashire
v. Killing-
worth.

17. Plaintiff covenanted by indenture to transfer S. S. stock to defendant, *on or before September 21*, and the defendant covenanted to pay the plaintiff 8500 l. *on or before the said day*, and gave bond for performance of the said covenant: in debt on the bond the plaintiff set forth all this matter, and that *pro & in consideratione præmissorum*, the defendant covenanted to pay the money, and that he was ready at the time and place agreed, &c. and that defendant, or any for him, was not there to receive. On a demurrer it was adjudged, that these were *mutual covenants*, the transfer being to

pay for a bargain which he cannot have; that there ought to be quid pro quo, whereas in this case defendant had sold the plaintiff a bubble or moonshine; that the defendant was the chief actor, that he went to market with this bubble; and that since no transfer can be made, he granted a perpetual injunction, and ordered the defendant, at the plaintiff's charge, to enter satisfaction on the judgment. And afterwards the cause came on to be re-heard by Lord C. King, who made no decree, but said, he could not divide the loss, and recommended an agreement, and to share the difference. 2 Wms.'s Rep. 217. Pasch. 1724. Stent v. Baylis.

21. *Mortgagee of S. S. stock sells part*; he was liable to account. MS. Tab. tit. Stocks, pl. 3. cites May 10, 1727. Harrison v. Franks.

Comyns's
Rep. 393.
pl. 193.
Harrison,

and Hart, and Franks, S. C. in the Exchequer, Mich. 13 Geo. 1. an account was directed for all monies received on the sale, notwithstanding the day of redemption was past.

him 1000 l. capital S. S. stock, at or before the shutting up the books for the then next Christmas dividend. A. accordingly sent a notice in writing to H. that he would transfer this stock to him on the Friday or Saturday next, being the day for the shutting up the books. The plaintiff avers in his declaration, that A. was at the S. S. House on the day to make a tender, but that neither H. nor any for him, was there to receive the transfer: upon which the plaintiff, as executor to A. brings this action. The plaintiff gave in evidence, that the usual and only time for making these tenders was between the hours of nine and one; and that not so much as the transferring any stock can be made but between these hours, unless in these particular days just before the shutting up the books for the making of their dividends. That A. had a person ready to make this tender all the time between those hours; that three calls accordingly were made, but that nobody came for H. to accept it. The Court said, that this matter was now brought to one single point of law, whether upon the face of the plaintiff's

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Id. 179.
Mich. 6
Geo. 2.
1732. the
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tion being
argued
again, the
court over-
ruled it for
the same
reasons
given before.
And not-
withstanding
another
objection
was taken
to the verdict,
it was given
to the
plaintiff.

building, which ~~only~~ consist of one room only, as well as of more. The Chief J. observed, that if defendant had pleaded the general issue, the plaintiff must have proved his tender in that very particular part of the house where the books are kept. Adjournatur. Barnard. Rep. in B. R. 456, Trin. 5 Geo. 2. Jacobs v. Crosley.

25. E. H. purchased 1000 l. S. S. stock, and accepted the same in the S. S. books soon after his buying it. Afterwards another of the same name, but known by another description, got, by some means or other, the 1000 l. stock belonging to the first E. H. placed to his account in the S. S. books, and some years afterwards transferred the same to R. his broker, in order to sell the same for him, which R. accordingly did. Both the E. H.'s died. On a bill brought by the representative of the first E. H. the Court was of opinion, that the representative might elect either to have this specific quantity of stock bought for her, or a satisfaction for it as it was at the time it was sold out, at which time a conversion was made of it; and likewise seemed to incline, that the company might be liable, in case the representative of the last E. H. has not sufficient assets, because they must be considered as trustees for the first E. H. at the time he purchased this stock; and as the same was transferred without

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land S. C. (1841)
our Vals. 1841
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Cost S. C. 1841
for 1841 v.
that 1841 v.
fore 1841 v.
1841 v.

Stopping Lights.

S. C. cited
in case of
Hughes v.
Kemish.

before time of memory, the owner of the land had granted to the owner of the house to have the said windows, without any stopping of them; and so the prescription may have a lawful beginning; cited in Aldred's case, 9 Rep. 58. as Trin. 29 Eliz. B. R. the case of Bland v. Mosely.

Le. 168. pl.
234. Bowry
v. Pope,
S. C. ac-
cordingly.

2. If 2 men be owners of 2 parcels of land adjoining, and one of them does build an house upon his land, and makes windows and lights looking into the other's lands, and this house and the lights have *continued by the space of 30 or 40 years*, yet the other may, upon his own land and soil, lawfully erect an house or other thing against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land. It was agreed by all the justices, and adjudged accordingly. Nota, *cujus est solum, ejus est summitas usque ad cælum*. Temp. E. 1. Cro. E. 118. pl. 3. Mich. 30 & 31 Eliz. B. R. Bury v. Pope.

Raym. 87. 3.
Palmer v. houl
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Mich. 14 Fletu
Car. 2. B. R. S. C.
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Sid. 167. pl. 26. S
absent.——Ibid.

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Court doubted that
* without reserving
Mod. 314. Mich.
In the case of Fletch
case of Bowry v. Po

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Sid. 167. 4.
pl. 26. S. C. may
and S. P. by upon
Twissden will
and Wind- will
ham.—— Palm
If a man
builds a house upon
does thereby stop the
holds, unless there be
& 25 Car. 2. B. R.

Sid. 167. 5.
pl. 26. S. C. light
and S. P. light
by Twissden Fletu
and Wind- Fletu
ham J.——Ibid.

(B) After Unity of Possession.

1786. pl.
1195 S. C.
resolved that
the vendee
shall never
abate the
windows.

1. **T**WO houses came into one hand, and windows, &c. are altered, and then the houses are divided, the lights cannot be restored by law, but must be taken as they were at the time of the last division and conveyance. Holt. 131. pl. 173. Hill. 13 Jac. C. B. in the case of Robins v. Barnes.

2. If

2. If I have an ancient house and lights, and I *purchase the next house or ground*, where no nuisance is done to my former house, my privilege against what I have purchased ceaseth; for I may use my own as I will. Now if I lease my former house, I may build upon the latter; or if I lease my latter, he may build against me, as it may seem. Hob. 131. Robins v. Barns.

(C) Stopping Lights in London.

1. **BY** the custom of London a man may build upon his *old foundation*; and if there be *no agreement* to the contrary, may stop up his neighbour's windows: by this custom, if he make new windows higher, the other may build up his house higher, to destroy those new windows. Godb. 183. pl. 262. Mich. 9 Jac.

Yelv. 215,
216. Hill. 9
Jac. B. R.
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Roll. Rep.
221. pl. 27.
S. C. says
the plaintiff
did not al-
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request to
remove the
said shed;
and that
Coke
thought the
action did
not lie, be-
cause no
act was
done by the
lessee, but a
continuance,
and that he
could not
remove it
without be-

2. In case the plaintiff declared that he was seised of a house and chamber in N. and that A. was possessed of a shed adjoining to the said house, and 1 Sept. 40 Eliz. and time whereof, &c. there was a *window in the said house looking towards the said shed, by which window, and by no other means, the light came into the chamber of the house*, and the said A. 30 Sept. 40 Eliz. *created a building upon the shed so near to the house, that it stopped all the light of the said window, so as he lost all his light*, and that the defendant possessed of the said new building, had continued and not removed the said new erection. A. leased this shed to B. who now dwelt in the said shed, and the *action* being brought against B. it was agreed by all the court, that this action lay *against him who erected it*: but it was objected, that it lay *not* against the defendant, who only is *lessee for years*, and inhabitant there; and that if the plaintiff had any remedy, it should be a quod permittat against the tenant of the freehold. And to that opinion Coke Ch. J. seemed to incline, but the other justices

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(E) Pleadings.

See (A) pl. 1.

1. **WHERE** one prescribes to have lights to his house, and the other prescribes to stop them up; this is not good. Per Coke Ch. J. Godb. 183. pl. 262. Mich. 9 Jac. B. R. in case of Hughes v. Keenes.

S. P. Per Cur. Freem. Rep. 210. pl. 27. Mich.

1676, in case of Hickman v. Thorny.

2. In trespass of taking, breaking, and carrying away 12 boards of the plaintiff's. The defendant, as to the taking and carrying away, pleaded not guilty; and, as to the breaking, he justified, because the plaintiff had fixed them to his house, and that they hindered his light, and he broke them, as lawfully he might. The plaintiff replied, that he did not fix them to the house of the defendant; and upon this they were at issue, and found that they were fixed, but not by the

S. C. cited 2 Roll. R. 238. in case of Abbot v. Blaisfield.

say how many), and that, time out of mind, the light came in at the windows; this was allowed a good form of alleging the prescription. Vent. 248. Mich. 25 Car. 2. B. R. Anon.

6. Trespas on the case for stopping up ancient lights, by the erection of a wall; prescription in *quodam messuagio sive tenemento antiquo* is good enough; though an ejectment will not lie *de uno messuagio sive tenemento*, because the sheriff will not know what to deliver possession of; judgment for plaintiff. 2 Show. 96. pl. 94. Pasch. 32 Car. 2. B. R. — v. Fetherston.

7. In case for stopping lights the plaintiff declared only *quod possessionatus fuit of such an house in which habuit & habere debuit such and such lights*. Exception was taken on demurrer, because he did not say time out of mind, nor so much as that it was an ancient house, and that the lights were ancient; but it was held well enough upon the case of * Sands v. Trefusis. Show. 7. Pasch. 1 W. & M. Villers v. Ball. & al.

8. Plea of a former action for stopping his lights, and a recovery therein is a bar to any new action for such erection; but not to another action wherein he declares of the continuance of the nuisance.

9. In near the declared *quas lu* plaintiff *not said* to be a against And a *antiquu.* 2 Cro. *usage t* usage t case, fo The Co good u) Rosew

declaration to be *habuit* ancient lights and ancie accordingly; but Holo

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principles and other proper cases

* Cro. C. 573. pl. 18. Hill. 15 Car. B. R.

2 Salk 10. pl. 3. S. C. accordingly.

Comb. 481. S. C. accordingly, but that it would have been naught upon demurrer; for the defendant might not be a wrong-doer, erecting upon his own ground, &c. — Carth. 454. S. C. accordingly. — 6 Mod. 116. S. C. Mich. 13 W. 3. mentions the words of the declaration to be *habuit* ancient lights and ancie accordingly; but Holo

Stranger.

(A) Of what Things a Stranger may take Advantage.

1. **H**E who is a stranger to the issue shall not have advantage of the verdict or trial, though he was party to the original.

Br. Record, pl. 3. cites 33 H. 6.

2. As in debt against two of D. by several praecipes, and both were outlawed, and the one taken by capias utlagatum, and pleaded that no

Br. Trials,

pl. 2, 3.

cites 33 H.

6. 1. S. C.

—Br. Ver-

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Roll's Rep.

196 pl. 38.

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advantage of it; for the limitation of the ice over to E. is

8. *Restitutions* have favourable constructions more than *grants*. Advowsons, without express words, pass in case of restitutions, but not in case of a grant. Arg. Lat. 255. in case of Surry v. Cole, cites 41 E. 3. 5. M. 3 Jac. C. B. Barker and Barret.

9. *Things that go in abridgment of the common law*, shall be taken strictly, and shall have no favour in construction. See Yelv. 92. Trin. 4 Jac. in case of Armiger v. Browne.

10. A claim of *discharge of tithes* is contrary to common right, and therefore shall be strict. Noy, 97. Hill. 15 Jac. C. B. in case of Slade and Drake.

11. *Inhibitions, &c.* are stricti juris. 2 Bull.

12. *Forfeitures* are odious in law, and shall be taken strictly. Per Cur. See Hutt. 103. Pasch. 5 Car. Paston v. Utber.

13. *Eschoppels* are to be taken strictly; for they neither give nor take away any right. No man is bound by them, but the parties and their privies. Arg. Show. 27. Trin. 1 W. & M. in case of Inledon v. Burges.

14. *Remitters* are favoured in law. Arg. See Show. 420. Trin. 6 W. id Dr. Birch.

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See Powers,
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For more of Stricti Juris in general, see 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

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void by a particular maxim of the common law, which will not allow a fee to be limited upon a fee, or by that other maxim by which a stranger cannot take advantage of a condition. Per Parker C. 10 Mod. 423. Mich. 5 Geo. 1. in Cane. in case of Marks v. Marks.

For more of Stranger in general, see Arbitrement, Conditions, Feits, Fines, (F. 4.) and other proper titles.

S. C.
Goldb.
184. pl.
142. by the
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104 S. C.
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See Cro. E. 816. Patch. 47 Eliz. L. R. Dumper v. Symonds. —
4 Rep. 100. a. Hill. 45 Eliz. S. P. in S. C.

S. C. B. A.
per 100
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7. *Cyfrons* is bar *g^otes* shall be taken strictly. See Yelv. 1.
Patch. 44 Eliz. B. K. haipo e. Long.

in maintenance, in making of a copyhold case, shall be taken favourably.
dng. p. 12 Patch. 44 Eliz. B. R. 3 C. — case it is upon the law, as Term 10. 1073
shall be taken strictly. Cro. E. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

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8. *Restitutions* have favourable constructions more than *grants*. Advowsons, without express words, pass in case of restitutions, but not in case of a grant. Arg. Lat. 255. in case of Surry v. Cole, cites 41 E. 3. 5. M. 3 Jac. C. B. Barker and Barret.

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14. *Remitters* are favoured in law. Arg. See Show. 420. Trin. id Dr.

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For more of Stricti Juris in general, see 2. 10. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Striking.

(A) Striking, &c. in privileged Places. Church, or Church-yard.

D. was indicted upon the statute of 5 Ed. 6. for striking in St. Paul's church-

yard; and it was moved, that, it being a church-yard of a cathedral church, it is not within the statute; but *Curia contra*, Cro. E. 224. pl. 7. Pasch. 33 Eliz. B. R. Dethick's case. — Le. 248. pl. 337. S. C. Accordingly prohi- church-yard; because *col pro expensis litis*; others *Largo v. Alton*. in the B. R.

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Whether the offender, by the offence committed, immediately sentence given, or proof deemed excommunicate, (And further, that he sh to the next term; but th mean time. D. 275. b 4; Eliz. B. R. In case c communicated, is to be tion, and not before. — tiff ipso facto; — an excomm — although the sentence of clergy, or Wherefore, — whole can be receiv — Eliz. 570. pl. 33. B. R. C. B. Vinter & Alton, 86. S. C. but seems to

Where by the statute, — upon ipso facto; — that he has not pay to the clergy. — Over v. F. — not in

It is to be at- Gules in the — chur h, or — v. — chur i

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1. 5 & 6 Edw. 6. ENACTS, that if any person shall, by words only, quarrel, chide, or brawl, in any church or church-yard, it shall be lawful for the ordinary to suspend him, if he be a layman, *ab ingressu ecclesie*; and if a clerk, from the minis- tration of his office.

S. 2. in church

Whether the offender, by the offence committed, immediately sentence given, or proof deemed excommunicate, (And further, that he sh to the next term; but th mean time. D. 275. b 4; Eliz. B. R. In case c communicated, is to be tion, and not before. — tiff ipso facto; — an excomm — although the sentence of clergy, or Wherefore, — whole can be receiv — Eliz. 570. pl. 33. B. R. C. B. Vinter & Alton, 86. S. C. but seems to

Where by the statute, — upon ipso facto; — that he has not pay to the clergy. — Over v. F. — not in

If any shall maliciously strike any person with a weapon in church, or church-yard, or shall draw any weapon in church or church- yard, with intent to strike another, every person so offending, and con- victed by verdict, or confession, or two witnesses, before the justices of assize, or quarter sessions, or justices of peace in their sessions, shall have one of his ears cut off; and if he have no ear, he shall be

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munifi- yet he smitted pl. 10. d so is

burned in the cheek with the letter F. and shall stand excommunicated draw a weapon (also facts, as aforesaid).

in his own defence) there; for it is a sanctified place, and he may be punished for that by 2 Ed. 6. and so if in any of the king's courts, or within view of the courts of justice, because a force in that case is not justifiable, though in his own defence. *Noy, 104.* The 5th resolution in the case of *Day v. Beddingfield & al.*—*S. P. Lev. 106. Trin. 15 Car. 2. B. R. in Bokenham's case.*

† S. P. Cro. J. 367. Hill. 12 Jac. in the Star-chamber, in the case of FRANCIS V. LEY, the 5th reformation. But says, see the Statute of 5 E. 6.—S. P. Hawk. Pl. C. 57. cap. 21. s. 4.

P. was indicted upon the Statute of 5 E. 6. cap. 4. for drawing his dagger in the church of H. against J. S. and does not say (according to the Statute) to the intent to strike him; and for this cause it was void. But then it was moved, if this were not good as for an assault, that he might be fined upon it. But, per Cur. it is void in all; for being $\frac{1}{2}$ indicted upon the Statute, it is void as to an offence at the Common Law. Cro. E. 231. pl. 23. Pasch. 33 Elis. in B. R. Penhallo's case. S. C. 2 Le. 188. pl. 234. by the name of Perchall's case, accordingly per Sands, clerk of the crown, and the whole court. For the conclusion of the indictment is contra formam Statuti, and therefore the jury cannot inquire at the common law. 4 Le. 49. pl. 127. Penhall's case. S.-C. accordingly, and in almost the same words.

¶ S. P. accordingly, by all the justices contra Jones, that being laid contra formam statuti, it cannot be good as for a battery at the common law. Cro. C. 465. pl. 2. Trin. 22 Car. B. R. Cholmley's case.

(B) Striking, &c. in privileged Places. *King's Palace, Courts, &c.*

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He will not be compelled, but, if he will not be bound, he shall be ordered to do so. *Ex. D. vis. al. 22. citat. S. C.*

3. A. E. *beat a fine*, and she brought suit against her in 3 R. 220. It is much as he beat her with a piece of iron, and being her infirmity in the legs. And *putting* was made to her, and she paid who had the merchandise in the shop, and the plaintiff's affidavit.

4. If any man in Westminster-Hall, or in any other place, sitting the courts of Chancery, the Exchequer, B. R., C. B., or before justices of assize, or justices of oyer and terminer, (which courts are mentioned in the statute of 25 E. 3. De Proditionibus,) shall draw a weapon upon any judge, or justice, though he strike not, this is as great misprision, for the which he shall lose his right hand, and forfeit his lands and goods, and his body to perpetual imprisonment. The reason hereof is, because it tends ad impedimentum legis terra. 3 Inst. 140.

Note, the law makes a great difference between a stroke or blow, in or

before any of the said courts of justice, where the king is representatively present, and the king's court, where his royal person resides. For in the king's house (as has been said) blood must be drawn; which needs not in or before the courts of justice, but a stroke only suffices. Again, the punishment is more severe in the one case than in the other, such honour the law attributes to courts of justice, when the judges or justices are doing of that which to justice appertains; and the reason is, quia justitia firmatur solium. 3 Inst. 140. — S. P. Hawk. Pl. C. 57. cap. 21. s. 3.

6. By the ancient laws of this realm, striking only, in the king's court, was punished by death. See Lambert, inter leges Inæ, ca. 6. Si quis in regia pugnarit, rebus suis omnibus multator, & sitne morte etiam plectendus, regis arbitrium & jus esto. Inter leges Canuti, cap. 56. Si quis in regia dimicarit, capitale esto, &c. Inter leges Alveredi, cap. 7. Qui in regia dimicarit, ferrumve distrinxerit, capitor, & regem penes arbitrium vitæ necisque ejus esto, &c. 3 Inst. 140.

S. C. cited 6 Mod. 75. Mich. 2. Ann. B. R. in the case of Elderton, Porter, &c. and Powell, J. said, that the privilege of a peer is not confined to actual residence

and in fact at the time of the case, and of Burbeck's attainder there is no judgment that he was actually in the Tower, and his striking in a peer's house is not warranted by the record.

Dr. 2. 6. in anno 4. & 5 P. 1. M. cites 4. E. 3. 1. oron. 6. as a law, which is here

7. PETER BURCHET, prisoner in the Tower, struck, within the Tower, JOHN LANGWORTH his keeper, (who stood in a window reading of the Bible) with a billet on the head behind, whereby blood was shed, and death instantly ensued. This being without any provocation, was adjudged murder, for which he was executed, (which was in the Tower, or in the Tower-House,) his right hand was cut off, by order of the judges. 2. for 3.

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8. Where some of the books above said say, that the offender shall forfeit his lands, and some, that he shall be disinherited, yet the forfeiture of his lands is only for term of his life; for, being a felony, the blood is not corrupted, nor the heir disenable to inherit. And this severe punishment is at the suit of the king, and the party may have his action, and it shall be tried by the officers and

Striking.

14. C. was bound to his good behaviour for giving *the lie* in *Westminster-Hall*,—and the other for giving provocation. Lev. 107. Trin. 15 Car. 2. B. R. Collins v. Man.

(C) Indictment and Pleadings.

1. A Man was indicted upon the statute of E. 6. that in the church-yard, such a day, *extraxit gladium* against I. L. & *ipsum percussit*; and because the statute was, if any person maliciously strike another, or shall draw any weapon with an intent to strike any person, and the indictment was *quod extraxit*, but does not say, *ad percutiendum*; and because it is *quod percussit*, without saying, *malitiose*; the party was discharged upon judgment. Noy, 171, 172. Anon.

2. Indictment against the defendants for that they *insultum fecerunt* upon J. C. of H. in *ecclesia de Shoreditch præd' & prædict.* J. H. then and there in the said church, did beat and wound, & contra formam statuti, &c. the defendant was found guilty. It was objected, that the indictment being *contra formam statuti*, is ill, and this offence is not punishable by the statute unless he smote with or drew a weapon in the church or church-yard with an intent to strike there, which is not mentioned in the indictment; and by the 2d clause in the statute smiting and laying violent hands is excommunication ipso facto. The justices doubted. But because of the words (Shoreditch prædict.) whereas Shoreditch was not mentioned before; all the Court held the indictment void. Cro. C. 464. pl. 2. Trin. 12 Car. B. R. Cholmley's case.

3. Information for striking in the king's court, &c. the defendant pleaded *privilege of parliament*; and urged for himself, that a peer could not be impleaded during the privilege of parliament, either in a civil or criminal cause, unless it was capital; and cited the case of the lord ARUNDEL and LOVELACE. It was insisted for the
 Arundel was a great misde-
 at he could be prosecuted
 of parliament. But it was
 does not extend to high
 or surety of the peace, and
 case, and Prinn's Survey
 02. And the Court held
 hief; but notwithstanding
 ivilege, to which there was
 demurrer, and afterwards the plea was over-ruled by the Court;
 and he was fined 30,000 l. Trin. 3 Jac. 2 Comb. 29, 50. Pasch.
 3 Jac. 2. The King v. the Earl of Devonshire.

For more of Striking in general, see Indictment, (D),
 and other proper titles.

(A) Subornation.

1. **S**ubornation is derived of *sub* & *orno*; and *ornare* in one of its significations is to prepare, so that *subornare* is as much as to say, to prepare secretly, or under-hand. *Est autem subornare quasi subitus in aure ipsius male ornare, unde subornatio dicitur de falsi expressione, aut de veri suppressione.* And here is to be noted, that in the judgment of the parliament *plus peccat author quam actor*; for the suborner forfeits 40*l.* and he that is suborned but 20*l.* 3 Inst. 167.

2. 32 H. 8. 9. enacts, that no person shall suborn any witness by letters, rewards, promises, or other means to maintain any matter or cause to the disturbance or hindrance of justice, or to the procurement of any
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the crown

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whereupon he was taken and brought into court, where he offered to move for a writ of judgment; but the Court was of opinion that it was out of time; for that the judgment quod erat actus was a final judgment, and a subsequent writ is only for the recovery of the time. 1 Salk. 78. pl. 3. *Miles & Anon. vs. The Queen & Davy*

could not be moved in arrest of judgment. It might be well be said that the writ was taken (in mitigation of the fine) before the judgment was given.

5. *A* per- But the re-
B. R. porter says,
he had
known one

2 Show. 1, 2. —
was a fine of 500 marks
afterwards, in another

omit a perjury, but he
went cannot be framed
sued to swear. The
led him to say, whether
is true in fact, and yet
se; the first is perjury
indistinctly was quashed,
left out. They held,
Hill.

contracted by comes to
the Court. Such
in the Court, the
is certain that he is

6. *A* per- 7 Mod.
fined; 100. 5. C.
And says,
that upon
the writ,
the Court
did not
leave it,
and thus
agreed that

that there was a cause in Chancery between A. and B. and that a commission did issue out of that court to examine witnesses in the cause, and that I. S. was sworn a witness before the said commissioners, (without saying in that cause, or what he had sworn). That the defendant did solicit him to forswear what he had sworn before; and it not appearing that the oath was in any cause pending, or that it was in any material point, were two exceptions; for that ought to be set forth, that the Court might judge whether it was a point material or not; for it could not be perjury if it were not, and then solicitation could not be a subornation. 7 Mod. 100. Mich. 1 Ann. B. R. The Queen v. Darby.

For more of Subornation in general, see Perjury, and other proper titles.

[21]

Subpoena.

(A) Of the serving a Subpoena.

1. **A**N attachment was awarded against the defendant for his non-appearance upon oath that he was served with a subpoena, who now appeared gratis, and would have excused himself, that he had no notice of the subpoena; but he that served the subpoena *deposed*, that he did *hang the same upon the defendant's door, and within half an hour after saw him abroad with a writ in his hand, which he supposed to be the subpoena*, therefore he was committed to the Fleet. Cary's Rep. 57. cites 1 Eliz. fol. 249. *Richers v. Stilman.*

So where the defendant made oath, the plaintiff caused him to be served with a subpoena the Saturday is.

2. The defendant was served with a subpoena *the day of the return*, and attachment was awarded *and served six score miles off*, so as he therefore a commission is antry, paying the plaintiff *George v. Bolington & Deane.*

two days before the end of the term, London; wherefore the attendant e said subpoena; and yet nevertheless; therefore, and for that, the discharged of the attachment, putting fear.

S. P. Cary:
Box 111.
N. Y. &
12 F. St.
Fid. & V.
Bk.

3. Upon oath made of a delivery of a subpoena to the defendant's wife, being in the defendant's house, who has not appeared, an attachment was awarded. Cor's Rep. 76. cites 18 & 19 Eliz. Barlow v. Baker

4 Walter James made oath, that he *hanged a subpoena* in the door of one Stacy Barry, widow, & *with the defendant used to re-*

fort, as he heard reported before that time, who has not appeared ; therefore an attachment was awarded. Cary's Rep. 79. cites 18 & 19 Eliz. Jeames v. Morgan.

5. Goodwine made oath, that at such a time as he came to the house of the defendant, to serve a subpoena upon him, according to an order of the 10th of May last, one of his servants came forth, and told him he was within, who thereupon delivered the writ to be delivered to the defendant his master. Cary's Rep. 91. cites 19 Eliz. Goodwine v. Sullyard.

6. Upon oath, that he saw one Lewis leave a subpoena in the hall of the defendant, and that the defendant was at home at the same time, who has not appeared, therefore an attachment is awarded against the defendant. Cary's Rep. 130. cites 22 Eliz.

7. Upon oath, that he did shew and offer to deliver to the defendant a subpoena, which he would not accept, and has not appeared, therefore an attachment. Cary's Rep. 134. cites 22 Eliz. Peris v. Thomas.

8. The defendant made oath, that the plaintiff showed him a subpoena, holding it in his own hand, and said it was against him, but would not let him have it, or see it, so that he might read it ; neither would he deliver him any note of his appearance, nor tell him the same,

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was regular, and insisted that it being above 12 months since the other defendant had left the lodging, the service was good ; and the Court was of that opinion. 2 Mer. 509. 332. 1 John. 1699. Parker v. Blackbourne

11. 4 Ann. cap. 16. s. 22 en. etc., that no subpoena, or process for appearance, shall issue out of any court of equity till the bill is filed, (except in cases of bills for injunctions,) and a certificate thereof to the

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S. C.

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Chan. Pres.
2d. pl. 87.
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the said de-
fendant had
lodged but
once, and
that was
above 12
years before
the service.

to the subpoena office, under the hand of the fix clerk, or other officer who usually files bills: for which certificate he shall receive no fee.

12. 5 Geo. 2. cap. 25. s. 1. enacts, that if in any suit in equity, any defendant against whom process shall issue, shall not cause his appearance to be entered, according to the rules of the Court, in case such process had been served, and affidavit shall be made that such defendant is beyond the seas, or that upon inquiry at his usual place of abode, he could not be found, so as to be served; and that there is just ground to believe that such defendant is gone out of the realm, or absconds, to avoid being served, the Court may make an order, appointing such defendant to appear at a day therein to be named, and a copy of such order shall within 14 days be inserted in the London Gazette, and published on some Lord's-day after divine service, in the parish church where such defendant made his usual abode, within 30 days next before his absenting; and a copy of such order shall be posted up, viz. a copy of such order made in Chancery, Exchequer, or Dutchy-chamber, shall be posted up at the Royal Exchange; and a copy of every such order made in any of the courts of equity of the counties palatine, or of the great sessions in Wales, shall be posted up in some market town within the jurisdiction of the Court, nearest to the place where such defendant made his usual abode, such place of abode being also within the jurisdiction of the Court; and if the defendant do not appear within such time as the Court shall appoint, then, on proof made of such publication of such order as aforesaid, the Court may order the plaintiff's bill to be taken pro confesso, and make such decree thereupon as shall be just; and the Court may order such plaintiff to be paid his demands out of the estate sequestered, according to the decree, such plaintiff giving security to abide such order touching the restitution of such estate as the Court shall make upon the defendant's appearance; but in case such plaintiff shall refuse to give security, then the Court shall order the effects sequestered to remain under the direction of the Court, until the appearance of the defendant to defend such suit.

For more of Subpoena in general, see Bill of Revisor,
Cous, and other proper titles.

(A) Bound. In what Cases.

So if an ab-
bas grants
an annuity,
and resigns,

1. **A** Prior granted an annuity, and resigned, and yet the annuity remained good; per judicium; quod nota. Brooke says this seems to be for life of the prior who granted it. And per Wood.

Wood, Vavisor, and Davers, the tender is good by the successor; *the abbot his successor shall be charged during the life of the predecessor who charged.* contra Brian. Br. Annuity, pl. 22. cites Fitzh. tit. * Grants, 99. And 15 H. 7. 1. agrees with Brian in this, and puts the difference, where the writing is, that *R. prior of D. or J. mayor of C. shall make the tender, and where it is that the prior of D. or mayor of C. without name of baptism.* Br. Annuity, pl. 22.

cites 32 H. 8. and Fitzh. Grants, 99. accordingly. ——— * Br. Grants, pl. 140. cites S. C. and 29 E. 3. 16. and Fitzh. tit. Abbe, 27. ——— But if a parson grants an annuity, and resigns, the grant is void; *quod fuit concessum.* Br. Grants, pl. 56. cites 21 H. 7. 1. ——— Br. Dean and Chapter, pl. 10. cites S. C. ——— S. P. per Butler, though the ordinary confirm it; for the annuity was determined before by the resignation. Br. Charge, pl. 54. cites 21 H. 7. 1.

2. A prior recovered an annuity against a parson, and after judgment the parson permutes; and there per Cur. execution shall be against the new parson, and not against him who has resigned; for the church is thereof charged. Br. Arrearages, pl. 12. cites 34 E. 3.

3. If an abbot confesses action, or a deed with warranty, this shall bind his successor for ever; per opinionem Curie. But Brooke says, quære of confession of an annuity; for of this the successor has no remedy. But if he confesses the action in *præcipe quod reddat*, the successor may have writ of right. But in the case of the annuity the person is charged only. Br. Abbe, pl. 28. cites 34 Aff. 7.

If an abbot confesses the action in writ of annuity, the successor cannot avoid it, but shall be bound for ever;

quod nota. Br. Abbe, &c. pl. 1. cites 9 H. 6. 3.

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r, to Br. Waiver
the de Chofes,
and pl. 20. cites
the S. C. ———
S. P. Br.
Waiver de
Chofes,
pl. 19. cites S. C.

here S. P. ibid.
good pl. 3. cites
and 47 E. 3. 23.

the writ was in the *debet & detinet.* Contra by executors. Br.

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of the patron and ordinary, shall per judicium. Brooke makes a bishop in the time of H. 8. in this case. Br. Grants, If a parson grants an annuity, 20. the patron and ordinary concerns it, and the parson; if the parson had granted it for him and his successor. H. 7. 1.

If a parson, parson, and ordinary grant an annuity in fee, and do not say for the parson and his successor, the successor shall not be charged; for this charges the parson only, and not the gibe. Per Fro-wicks, Ch. J. Br. Dean and Chapter, pl. 10. cites 21 H. 7. 4. — S. P. Br. Grants, pl. 56. cites 21 H. 7. 1.

So of annu-
ty, and com-
pensation for
sithes. Br.
Acceptance,
pl. 5. cites
9 E. 4. 21.
per Bigot,
and it was not denied.

9. Where a fine is levied between two priors, by which the one has annuity, and the other has an advowson, and he who grants the annuity is presentable, and has no covent nor common seal, and he dies; yet if his successor accepts the advowson, he shall be bound to pay the other; because he has quid pro quo. Br. Acceptance, pl. 2. cites 11 H. 4. 68. & 70.

10. If an abbot buys goods, which come to the use of the house, so that the house may be charged in case the abbot dies; there, if the vendor takes obligation of the abbot alone for the debt, this shall discharge the contract, and there, if the abbot dies, the action is determined, and the debt is lost. Br. Abbe, pl. 25. cites 20 H. 6. 21.

11. In debt, an abbot and prior, and his covent, are bound by obligation; and after the abbot or prior is created a bishop, the successor shall be charged, and not the predecessor. For he may be bound as head and member of the corporation; and where this is the deed of the corporation at the time of the making, it cannot afterwards become the deed of another person, who is no part of the corporation, quod nota. Br. Abbe, pl. 8. cites 21 H. 6. 3. & 22 H. 6. 4.

12. If issues are forfeited by an abbot, who is after made a bishop, the successor shall render the issues; per Pole. And there he took no difference, whether the abbot be removed in such manner as that he is disabled, and where not; as where he is deposed, and remains a monk, and after is made an abbot or bishop, and where he is made a bishop or abbot of another house immediately: for, per Newton clearly, there is a time in the law between the translation and installation, &c. Br. Abbe, pl. 8. cites 21 H. 6. 3. & 22 H. 6. 4.

13. If damages are recovered in trespass against an abbot, the successor shall be charged. Br. Abbe, pl. 9. cites 22 H. 6. 56. per Bingl

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15. In detinue of charters by an abbot the defendant said, that the predecessor of the abbot borrowed of him 100 s. which came to the use of the house, and put the charters in pledge; and if he will pay the 100 s. he is ready to deliver the charters. And the justices said, that it is was never doubted, but that the successor shall be charged by the contract or promise of the predecessor, if the thing

thing comes to the use of the house, though the contract was not by writing, *quod nota*. Br. Abbe, pl. 16. cites 21 E. 4. 19. & 21 E. 4. 30.

16. It was presented for the king, that an abbot and his predecessors have used to cleanse such a gutter, for the ease of the king's highway, by reason of the tenure of the same land; the defendant said, that [it was presented] upon the same matter in another place; [and] that, after the presentment, the predecessor cleansed the highway, which continued well, and sufficient in his time, and yet is; and a good plea per Cur. and that the successor shall not be punished for an offence in the time of the predecessor; per tot. Cur. And by the apprentices, the successor shall not be put to answer; for by the death of the predecessor the offence is determined. Br. Presentments in Courts, pl. 15. cites 5 H. 7. 3, 4.

17. If a parson is charged with annuity by prescription, and the annuity is arrear, and the parson resigns, and a new parson is inducted, he shall be charged with the arrearages, and not the old parson; for though the person of the parson be charged, yet it is by reason of the parsonage, and as parson; and when he has resigned, he is not parson. Br. Arrearages, pl. 8. cites 21 H. 7. 5.

18. In collateral conditions, a successor is not included, unless

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S. P. Br.
Dean and
Chapter, pl.
10. cites 28
H. 7. 1.—
S. P. per
Frowike,
Ch. J.
Kew. 64.

Mo. 606.
pl. 836.
Costard v.
Wingate.
S. C. says
they agreed
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son, being a
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parson, till
deprivation.
—D. 292.
b. Marg.
pl. 72. cites
S. 12 laws,
that depr.—
cio, 1102. 10

21. A. an incumbent; made a lease of a parsonage to J. S. under whom W. R. claims. Afterward B. was incumbent, by whose consent a decree was made to confirm the said lease. W. R. brings a bill against H. the present incumbent, to compel him to confirm the same; but the Court, seeing no reason so to do, were clear of opinion, that the act of a present incumbent cannot bind his successor, and so dismissed the plaintiff's bill. Chan. Rep. 148. 16 Car. 1. Prefs v. Hinchman.

For more concerning this division, see *Estates*, (Q. 2. 7.) &c.

[26] (B) *Of what the Successor shall take Advantage.*

1. **NOTE**, That the goods of an abbot belong to him during his life, and he has property in them, and may give them and sell them; but if he dies, the property of the goods not given nor sold are in the successor, and he may have trespass de averiis domus & ecclesie sue captis; and this, it seems, by the common law; for replevin affirms property. Contra of trespass. Br. Property, pl. 36. cites 9 H. 6. 25.

2. If a lease be made to an abbot during his life, and he is translated to another house, the successor shall have it during his natural life. Br. Abbe, pl. 13. cites 3 H. 7. 11. and 5 H. 7. 24. Per Rede.

Otherwise it
is if the
prior or
mayor are
not named by
proper name.

3. If J. S. mayor of London, has a license to purchase to him and his successors, and to the commonalty, his successors shall not enjoy the license. Br. Tender, pl. 15. cites 14 H. 7. 31. and 15 H. 7. 1.

Br. Tender, pl. 15. cites 14 H. 7. 31. and 15 H. 7. 1.

4. Usurpation by the master does not gain possession to the successor; for he does that which is wrong in another capacity; because a corporation cannot do wrong but by their writing under the common seal; per Fitzjames J. Br. Corporations, pl. 34. cites 14 H. 8. 29.

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have the presentation, and not the executor of the bishop. Br.
Executors, pl. 143. cites 50 E. 3. 26.

5. In ravishment of ward, it was held for clear law, that if a man held of a bishop in chivalry, and died his heir within age, and after the bishop died, and did not seize the infant, that the successor might seize him, and should have writ of ravishment of ward of him. Brooke says, quære if the executors of the bishop who was dead should not have him; for of a *thing transitory* the law adjudges possession without seizure. Br. Chattels, pl. 21. cites 2 H. 4. 10.

6. If an *abbot purchases to himself and his heirs*, it shall not serve but for term of his life. Contra of a bishop, per Martin & Cockain Just. Br. Corporations, pl. 20. cites 9 H. 5. 9.

7. An abbot is imprisoned, he may bring action thereof by name of the abbot, without saying J. N. abbot, &c. And if he recovers damages for a tort done to his person, the successor shall have execution, and not his executors; but Brooke says, it seems, that he cannot make executors; for he has no capacity but to the use of the house, &c. Br. Abbe, pl. 7. cites 7 H. 6. 27.

8. Where the master of an hospital, who has confreres, recovers in writ of annuity, and dies, the successor shall have the arrears by * scire facias, and not the executors. Br. Corporations, pl. 26. cites 19 H. 6. 44.

longs to the corporation. Contra of a parson of a church; for there his executors shall have the arrears incurred in his time. Br. Arrearages, pl. 6. cites 19 H. 9. 44. but it should be H. 6. — S. P. And so if a dean and chapter, or guardian of a house, recovers in debt or annuity, or other thing, in a court of record, as in right of their church and house, and die before execution sued, &c. the successor may have a scire facias to execute the same judgment. Perk. f. 499.

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9. In trespass it was admitted, that where a *parson dies after the 1st day of May, where the land is sown, and after another parson is made, and after the emblements are severed*, the executor of the first parson shall have the tithes, and not the now parson. Br. Emblements, pl. 9. cites 21 H. 6. 30.

S. P. Br. 10. If a *parson* dies before the feast of the Conception of our Lady,
Encumbent, the *successor* shall have the emblements growing, and the tithes,
pl. 1. Br. Emblements, pl. 2.
S. C.

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and Littleton Just. to the same purpose. A bond made to the dean of P. and his successors, is not good to the successors, but the executors shall have the action. Contra of bond to the dean and chapter of P. and their successors, there the successor shall have the action after the death of the predecessor. Br. Corporations, pl. 60. cites 20 E. 4. 2 ——— So of a bishop, per Littleton, to which Choke Justice agreed, and agreed the case by Brian, and that bond made to abbot or prior, and their successors omitting the convent, is good to the successor;

successor; for no other of the corporation is able to take the bond but the abbot. Br. Corporations, pl. 60. cites 20 E. 4. 2. — And where chantry priest is founded by such name, and successors, and land is given to him and his successors, this is good; and the successor shall have it, and not the heir; per Coke Just. Br. Corporations, pl. 60. cites 20 E. 4. 2. — But bond made to him and his successors shall enure to the executors, and not to the successors; by which the plaintiff prayed leave to purchase a better writ. Br. Corporations, pl. 60. cites 20 E. 4. 2.

12. If a man disseises the dean and chapter of P. and the dean dies, the successor shall have assize. Contra in case of an abbot disseised, and he dies, and another abbot is made. Note the diversity. Br. Corporations, pl. 86. cites 1 E. 5. 4.

13. In an action of covenant by executor to G. M. late bishop of Winchester, and sets forth, that Brian, the predecessor of the said bishop, had demised a rectory and certain lands to J. S. for 21 years, who had assigned to the testator of the defendant, and that the lessee covenanted with Brian and his successors to repair the chancel of the church, and the barns, &c. and assigned a breach in the not repairing by the testator of the defendant in the life of the said G. M. and that the lease afterwards expired. To this the defendant demurred, for that it was pretended that the executor of the bishop could not bring this action; for the covenant was with the predecessor bishop and his successors. But the whole Court gave judgment for the plaintiff, and that the executor is here well intitled to the action for the breach in the testator's time. 2 Vent. 561 Trin. 1 W. & M. in C. B. Morley v. Polhill.

(D) Relieved against Frauds of the Predecessor. [29]

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death, for the successor's benefit. Ld. C. Talbot thought it too hard to set aside the lease, the lessee not appearing to have had a great bargain, the repairs having been great, and he had sold part, and in the taking it he looked no further back than to the decree; but as to the late rector, he had no doubt but the Cool. might be considered as a part of the trust, and to be a part with interest to the now rector from the death of the former; and decreed the Cool. to be laid out in a purchase for the rector and his successors, and till then to be laid out on security in trustees' names, and the late rector's

tor's executors to pay costs out of his assets; but as against the lessee dismissed the bill, but without costs. Cases in Equ. in Ld. Talbot's Time, 199. Trin. 1736. Galley v. Baker.

See Physicians (A)
pl. 8.—
Trial (X. d.)

(E) Actions by or against Successor. And Pleadings.

There were
2 mischiefs
at the com-
mon law,
(as many
did hold)

1. By 52 H. 3. *IT is provided, That if any wrongs or trespasses be done to * abbots, or other prelates of the church, and they have sued their right for such wrongs, and be † prevented with death before judgment given therein,*

that in the case of abbots, priors, and other regular and religious persons, if the goods of the monastery were taken away in the life of the predecessor, that after his death his successor had no remedy for such trespasses. The other mischief was, that if in time of vacation, when there was no abbot, prior, or other regular or religious sovereign, any intrusion were made, the successor had no remedy to recover the land with damages, though thereof his predecessor died seised, and both these are remedied by this act. 2 Inst. 151.

* This act extends only to abbots, priors, and other prelates that be *religious and regular*, and not to bishops and other persons ecclesiastical, being secular; for in the 2d clause of this act, *hujusmodi religiosorum* is mentioned for the distinction between religious and secular. (See the first part of the Institutes, sect. 133.) And the reason of this diversity is, that the abbots, priors, and other religious and regular persons, are dead persons in law, and have capacity to have lands and goods only, for the use and benefit of the house, and cannot make any testament; and therefore the church or religious house is holden always one, in respect whereof the succeeding abbot shall have an assise for a disseisin done in the life of the predecessor, and an action of waste, for waste done in his predecessor's time; but so shall not a bishop, archdeacon, dean, parson, or the like, that are ecclesiastical secular, because the church by their death has an alteration, and is not always one, and they may make their testament; for that they may have goods and chattels to their own use. 2 Inst. 151.

Also the *bishop* is of an *higher degree* than the abbots and priors, with which this act begins. 2 Inst. 151.

† See the note to the next paragraph.

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cites it as in the time of E. 1.

¶ If an abbot or prior be *deposed*, the successor shall have an action upon this act, although the predecessor be *alive*, as well as if he had died; for as to that house he is *civiliter mortuus*. 2 Inst. 151.

The successor shall have, by the equity of this statute, an action of *trespass of cutting down of trees, and carrying them away*, wherein it is to be observed, that acts that give remedy for wrongs done, shall be taken by equity. 2 Inst. 152.

§ The action that the successor shall bring upon this statute, shall be *bona & catalla domus & ecclesie sue tempore J. predecessoris sui*, which without question a bishop, dean, or other ecclesiastical secular, cannot say. 2 Inst. 152.

The

The prior of St. C. brought trespass quare bona & catalla ecclesie sancti G. & Nicholai predecessoris
sue prout apud C. cepit, &c. and the writ was awarded good; quod nota. Fitzh. tit. Trespass,
pl. 205. cites Mich. 47 E. 3. 23. and says, vide 16 E. 3.

Moreover, the successors shall have like action for such things as were lately withdrawn by such violence from their house and church, before the death of their predecessors, though their said predecessors did not pursue their right during their lives.

Yet if the taking of the goods were long before the death of the

abbot or prior, his successor shall have an action of trespass by this statute. 2 Inst. 152.—Fitzh. tit. Trespass, pl. 211. cites Trin. 16 E. 3. where a prior brought trespass of goods carried away in time of his predecessor, an objection was made that such writ lies not at common law, nor is given by the statute, unless freshly brought before the predecessor's death; and that if there was laches in the predecessor, such writ lies not: but it was over-ruled, and the defendant pleaded not guilty, and so to issue.

And if any intrude into the lands or tenements of such religious persons in the time of vacation, of which lands their predecessors died seised, as in the right of their church, the successors shall have a writ to recover their seisin; and damages shall be awarded them, as in assise of novel disseisin is wont to be.

Abbot brought trespass for cutting trees in time of vacation; it was in-

held that no action lay either by the common law, or statute; and that if this action lies for an abbot, it would lie for a bishop likewise for a trespass done in time of vacation: but it was answered, that the cases are not alike; and a respondeas ouster was awarded. Fitzh. tit. Trespass, 237. cites Mich. 18 E. 2.

This branch is taken by equity; for by these words the successor of an abbot, prior, or any other religious sovereign, shall have an action of trespass for trees cut down, and carried away in the time of vacation. 2 Inst. 152.

But a bishop shall not have an action of trespass in that case, 1st, as has been said; for that this act extends not to him. 2dly, The king has the temporalities during the vacation; and therefore he cannot have an

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wine. It was objected that the writ should be *bona & catalla ipsius* the prior; for that the property was his. But per Choke, the successor * cannot have action of this taking, but in respect of the right which was in the church; and therefore the writ is good. And per Danby, the prior could not have goods otherwise than in the right of his church; and he could not devise them, &c. and they held the writ good. Fitzh. tit. Brief, pl. 176. cites Trin. 9 E. 4. 33.

19. Scire facias against successor of a parson to have execution of certain arrears of annuity recovered against his predecessor; the defendant said, that he at D. in another county, resigned into the hands of the bishop, which he accepted, &c. and so he was not parson the day of the writ purchased, nor ever after; and the best opinion was, that this is a good plea; but by some nothing shall be entered but not parson the day of the writ purchased nor ever after, and the resignation shall be given in evidence; and it seemed to some that all should be entered for evidence and plea. Br. Scire Facias, pl. 133. cites 9 E. 4. 49.

20. If mayor and commonalty are disseised, and the mayor dies, the successor and the commonalty shall have *assize*, and the writ shall be *disseisvit eos*. Br. Corporations, pl. 56. cites 12 E. 4. 9, 10.

21. In *detinue* of charters by an abbot, it is a good plea that his predecessor pledged them for 10 l. which is not paid. Br. Chattels, pl. 25. cites 21 E. 4. 19.

For more of Successor in general, see Confirmation, Corporation, Estate, and other proper titles.



See (B)

(A.) By whom it may or must be done.

This does I. **BY** 20 H. 3. cap. 10. it is provided and granted, that every freeman, which † owes suit to the county, ‡ tything, hundred, and § wapentake, demesne, but not a villein. 2 Inst. 100.

† Note, there be 2 kinds of suits, viz. suit ** real, that is, in respect of his reversion, to a lord or town; and suit service, that is, by reason of a tenure of his land of the county, hundred, wapentake, or manor, whereunto a court baron is incident. Before this act, every one that held by suit service ought to appear in person, because the suitors were judges in those courts; otherwise he should be amerced, which was mischievous; for it might be, that he had lands within divers of those feignories, and that the courts might be kept in one day, and he could be but in one place at one time. But this statute extends not to suit real, because he cannot be within 2 leets, &c. 2 Inst. 99.

** S. P. per Trecm. Br. Suits, pl. 1. cites 45 E. 3. 23.

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† Here it signifies a court which consists of 3 or 4 hundreds, and does not there signify a leet, or view of frankpledge. 2 Inst. 99.

§ That, which in some countries is called a *hundred court*, in some countries is called a *wapentake*, quod angli vocant hundredum supradicti comitatus vocant wapentagium. Now the reason of the name was this: when any, on a certain day and place, took upon him the government of the hundred, the free suitors met him with lances, and he descending from his horse, all rose up to him; and he holding his lance upright, all the rest, in sign of obedience, with their lances touching his lance or weapon. For the Saxon word wapen, is weapon, and tac, is tactus, or touching; and therefore this assembly was called wapentake, or touching of weapon. 2 Inst. 99.

*Or to the court of his lord, may freely make his attorney * to do those suits for him.*

† [34]

He must make a letter of attorney

under his seal, which the steward ought to allow; and if he does not, the suitor may have a writ † out of the Chancery, for the allowance of him; or, if he doubted that he should not be allowed, he might have a writ before-hand to receive him as attorney. And such a writ shall serve during the life of the tenant, &c. for the words of another writ be, et quia virtus brevium nostrorum de hujusmodi attorney faciendo terminum non capit, nec terminus limitatur durantibus personis, &c. What such an attorney may do, and who cannot be attorney, see the statute of W. 1. 2 Inst. 100.—S. P. F. N. B. 156. (D).

The tenant may make attorney by his letters patent, to do suit at the court of his lord. F. N. B. 156. (D).—S. P. without suing forth any writ. Or the party may make attorney by the king's writ, directed unto the bailiffs, commanding them to receive such person for his attorney. Or he may have a writ out of the Chancery, directed unto the bailiffs, or sheriffs, to receive any such person for his attorney, that he will present unto the said bailiffs or sheriffs to be his attorney to do his suit. F. N. B. 157. (C).

And if the tenant, by his letters patent under his seal, make attorney for him to do suit for him at the lord's court, or at the hundred, and the bailiffs will not admit of him, &c. then he shall have a writ unto them. F. N. B. 156. (D).—And the book says, that if the sheriff or bailiff of the court refuse to admit such for his attorney, upon that refusal, the party shall have an attachment against the bailiff, &c. although he has not sued forth any writ directed to him before; because they do against the statute, which requires, that they admit him for attorney whom the tenant will make to be his attorney. F. N. B. 157. (C).—So if a man sues forth a writ to admit one for attorney, and the bailiffs refuse to admit him, the party shall have an attachment against them, without suing forth an alias, or a pluries, directed unto them. F. N. B. 157. (C).

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2 Salk. 604. in case of Tomkins v. Crocker, cites 12 H. 7. 3.

4. If the wife be tenant in dower of any land, she shall not be restrained to do suit for that land which she holds in dower, if the heir has sufficient land in the same county to be distrained for the same. And if she be distrained, then she shall have a writ pro exoneracione seclæ. F. N. B. 159. (A).

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5. Note,

5. Note, that men or women who have entered into religion, ought not to come unto the sheriff's torn, or unto the leet of any other, without great cause; and if they be distrained for to come, they may have a writ out of the Chancery to discharge them. F. N. B. 160. (C).

6. [So] clerks who are not parsons, nor have benefices, shall not be distrained, or compelled to come to torns or leets; but they shall have a writ to discharge them. F. N. B. 160. (C).

7. [So] by the common law, parsons of churches shall not be compelled or distrained to come to the king's leets, or to the leets of other lords of the lands annexed to their churches; and if they be distrained so to do, they shall have a writ. F. N. B. 160. (C).

A woman may be a free suitor to the courts of the lord; but though

it be generally said, that the free suitors be judges in these courts, it is intended of men, and not of women. 2 Inst. 119.

[35] 9. If the sheriff will distrain the tenants in ancient demesne, to come unto the leet or sheriff's torn, they may have one writ for them all, directed unto the sheriff, commanding him that he do not distrain them, &c. to do any suit at the leet or torn; and that writ shall be sued in all their names, if they will, as a monstraverunt shall be sued; or any of them may sue the writ in his own name, if he be distrained to do such suit. F. N. B. 161. (C).

See (C) pl. 5;

(B) How. By Parceners, Feoffees, &c.

• This is understood of suit service to courts baron, hun-

1. 52 H. 3. cap. 9. **F**OR doing suits unto courts of great lords, or of meaner persons, from henceforth this order shall be observed

dreds, and the like; and not of suit real, in respect of resistance, nor of suit to the mill; for the words be, de sectis fac' ad curiam, &c. 2 Inst. 117. — It is said by Tremayn, that suit real is due, by reason of the body; that is, because the body is resident within the precinct, and not by reason of freehold; and this is due at the courts royal, as at the courts of the king or queen, as at leets and wapentakes, which are the courts of the king or queen; and suit service is by reason of freehold, that is, by reason of their tenure; that is, for that they hold of their lord by suit to his court. Kitch. of Courts, 296. tit. Suits. — S. C. & S. P. Fitzh. tit. Barre, pl. 211. cites Mich. 5 E. 3. 23.

† At the common law, before the making of this statute

That † none that is infeoffed by deed from henceforth shall be distrained to do such suit to the court of his lord, without he be specially bound thereto by the form of his deed,

if the lord had made a reservation by deed, and reserved certain services, as, for example, fealty, and 2 s. rent, or 2 s. rent generally, which had implied fealty, in this case, if the lord had distrained for homage, or suit, or any other rent or service then reserved in the deed, not only the tenant and his heirs, but his assigns also, or any other tenant of the lord, might have rebutted the lord, his heirs, or assigns, by the deed; and this holds between party and party, privy and privy, privy and stranger, and stranger and stranger. But this act gives the tenant, or his heirs, a more speedy remedy; for hereby is given to the tenant, against the lord and his heirs, a writ of contra formam assensum. 2 Inst. 117, 118.

And lord Coke says, that herein are several things worthy of observation, as,

1. When

9. When any act does prohibit any wrong or vexation, though no action be particularly named in the act, yet the party grieved shall have an action grounded upon this statute; which in this case is a prohibition to the lord or his bailiffs, and recites this act; the form whereof you may read in the Register, & F. N. B. Now where it may be objected, that in Mich. 16 H. 3. reported by F. tit. Avowry, 243. that upon a confirmation a writ of contra formam feoffamenti does lie; and by that book it should seem, that a writ of contra formam feoffamenti did lie at the common law before this statute, which was made in 52 H. 3. To this it is answered, that the said case is misprinted; for where it is Mich. 16 H. 3. it should be 56 H. 3. when the case was so resolved, and in which term, viz. the 16th day of Novemb. H. 3. died; so as that opinion was after our statute, and that the writ was given by this statute, the writ does recite it. And where in this clause the statute says, *shall be distrained*, all this chapter is to be understood of suit service; because *for suit real no distress can be taken, but for the amercement in default thereof.* 2 Inst. 118.

2dly, Where the statute says, *contra formam feoffamenti*, yet if the lord confirms the estate of the tenant to hold by certain services, upon this confirmation he shall have a contra formam feoffamenti, for that it is within one and the same reason. 2 Inst. 118. — Where the services by the deed of confirmation are less than before. Br. Contra formam Feoffamenti, pl. 3. cites 16 H. 3. 1. & Fitzh. tit. Avowry, 243. — Ibid. pl. 5. cites S. C. — Kitch. of Courts, 209. tit. Suits, S. P. cites 10 H. 3. tit. Avowry, 243. & 26 E. 3. tit. Avowry, 246. — F. N. B. 163. (G) cites Mich. 16 Ed. 3.

3dly, Upon these words (*certain service*) if one give land in *frankalmagne*, or in *frank-marriage*, he cannot have a writ of contra formam feoffamenti; because there is no certain service contained in the feoffment or gift, and therefore out of this act; but he may rebut. 2 Inst. 118. — F. N. B. 163. (F) S. P. cites the opinion of Parning, Pasch. 10 E. 3.

4thly, If the lord distrains either for suit, or for any other service, or rent, not contained in the deed, the tenant shall have this writ of contra formam feoffamenti; for the words of this act be, *ad hujusmodi sectam, vel ad aliud, &c.* 2 Inst. 118.

5thly, The statute says, *contra formam feoffamenti*; hereupon exposition has been made, that this writ lies only between parties, viz. by the tenant and his heirs, against the lord and his heirs; for they be included in privity of the feoffment, but so are not the assigns on either side. 2 Inst. 118. — This writ lies only where the plaintiff claims by his ancestor, and not where he claims as purchaser; and that so it is of no injurious vexes. Regist. Bev. 176. cites Hill. 19 E. 3. the last pl. by Widdoughby.

* The writ of contra formam feoffamenti is a prohibition in itself, and if the lord and bailiffs do contrary to the writs sent to them, the tenant thereupon shall have an attachment and distress. F. N. B. 163. (A) — S. P. And if he distrain after the writ delivered to him, the tenant shall have an attachment against him; and thereupon he shall recover his damages, if it be found for him, &c. and the process is prohibition, attachment, and distress. F. N. B. 163. (D).

If the feoffment be without deed, the feoffee is driven to his writ of *ne injuste vexes*. 2 Inst. 118. — So if the feoffment be made before time of memory, one shall not have a contra formam feoffamenti, but a *ne injuste vexes*, for such feoffment is not pleadable. F. N. B. 162. (E), in the new notes there, (b) cites 12 H.

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touch with feoffments by deed; whereupon it is observed, that the great antiquity of feoffments by deed, or without deed, or ancient time before the statute. 2 Inst. 118.

2dly, The reason in these troublesome cases, since the first going of one of the king (as has been said) is not allowed of; but a claim is required in order thereto, and the same was regular and pleadable. 2 Inst. 119.

O The law does even favour possession as an argument of right, and without troubles that did arise, and charters his first going, when the times

n Here he begins with feoffments without deed, or the next

*And they that are infeoffed by deed to do a certain service, as, for
piece of so many shillings by year, to be acquitted of all service, from
henceforth* See the note at the end of the chapter

henceforth shall not be bounden to such suits, or other like, contrary unto the form of their feoffment.

• This is to be understood after partition, for before that, the eldest has not

*And if any inheritance (whereof but one suit is due) descend unto many heirs, as unto parceners, who so has the * eldest part of the inheritance, shall do that one suit for himself and his fellows, and the other coheirs shall be contributaries, according to their portion, for doing such suit.*

enitiam partem, and therefore before partition this act extends not to it, and before partition there can be no contribution, as hereafter shall be said; but in the † king's case, all the coparceners shall do just as well after partition as before, and so shall their several feoffees, for this act extends not to the king; for the words be, ad curiam magnatum, &c. 2 Inst. 119. — S. P. For the king not being named, is not restrained by the statute. Pl. C. 240. b. in case of Willion v. Ld. Barkley. — Br. Suite, &c. pl. 4. cites 24 E. 3. 73. and makes a quere as to the case of a common person, before partition.

† S. P. F. N. B. 159. (C). — Kitch. of Courts, 297. tit. Suits, cites S. C. & 13 H. 7. 15. — But if the land be holden of another lord, then that † coparcener or his feoffee, who has the part of the eldest sister, shall do the suit alone; and if the lord will distrain the other coparceners, then they shall have a writ against him, directed to him or his bailiffs, to discharge them of that suit, and distress taken, &c. F. N. B. 159. (C).

† S. P. Pl. C. 240. b. Arg. in case of Willion v. Ld. Barkley.

If the eldest after partition will not do the suit, in the case of a common person the lord may distress the other parceners, as well as the eldest for the suit, and the other parceners may have upon this act a writ against the eldest to compel her to do the suit. And if the eldest does the suit, and the residue refuse to contribute to her charges, she shall have upon this act a writ de contributione facienda to compel them to contribute. 2 Inst. 119. — S. P. F. N. B. 159. (E). — S. P. F. N. B. 162. (B). — So if the eldest does the suit, and the other coparceners agree with the eldest for a rate; now the writ of contribution shall be brought against the others, who would not contribute, &c. F. N. B. 162. (B).

And yet this act extends to the feoffee of him that has enitiam partem, and so it is of the tenant by the courtesy. 2 Inst. 119.

[37]

This is to be understood, either when the tenant holds by suits, and

And if many feoffees be seised of an inheritance (whereof but one suit is due) the lord of the fee shall have but that one suit, and shall not exact of the said inheritance but that one suit, as has been used to be done before.

enfeoffs others, shall have but others, or when they shall deliver not have a writ there can be no several suit, as suit, if the lord distress them of the suit on this and of the Register. but says, quaretrain which he shall have only

§ S. P. 61 makes feoffee statute; for w agrees F. N. B

§ S. P. F. N. B. 159. (D). — And if he sue such writ, and be distrained, then he shall have an attachment against the lord, or the bailiffs to whom the writ was directed, to answer that contempt, in which writ he shall recover his damages, &c. F. N. B. 159. (D).

If several are infeoffed of land, for which one suit ought to be done, &c. Now if they agree among themselves, that one of them shall do the suit, and that the others shall contribute unto him, if he do the suit, and afterwards the others will not allow him for that suit according to their rate, then he shall have the writ of contribution against them, and the writ shall mention the agreement, &c. and if they cannot agree, then the lord shall distrain them all for all their suits, if the suit be not done; but if one feoffee of his own will do the suit for them all, without any agreement for the same made between them, the lord cannot then distrain the others for the suit, for as to the lord, it is not material whether there be any agreement between them or not; but between the feoffees, he that did the suit shall not have the writ of contribution against his companions, without agreement thereof made betwixt them. F. N. B. 162. (B).

If two are severally infeoffed by one tenant who holds of one manor of the king, every of them shall make suit. Kitch. of Courts, tit. Suit, 298. cites 45 E. 3. tit. Bar. 211.

1; there the lord sends, against the eldest but one suit; as the suit, he shall be aided, and intire, the feoffee shall do a writ if feoffees does the lord to discharge are grounded upon which appear in joint feoffment, the lord might distress, and so the lord

but if the tenant has a purview of this act, and with this writ suit.

And if those feoffees have no warrant or mesne which ought to acquit them, then all the feoffees according to their portion shall be contributaries for doing the suits for them.

That is to say, if they have neither one to warrant by spe-

cial grant, nor any mesne by tenure which ought to acquit them, tunc omnes illi feoffati pro portionibus suis contributarii, &c. This clause is to be understood of several tenants, as has been said before; and no provision is made by this act concerning contribution, where the parties are provided for by grant or tenure. 2 Inst. 120.

Here is a remedy given to the tenant against the lord, if he distrain contrary to this statute. 2 Inst. 120.

* Note, the suit that is past cannot be recovered, but damages for the same. 2 Inst. 120. —S. P.

For when the court-day is past the suit cannot be made. Br. Suit, pl. 7. cites 7 E. 4. 28. —Br. Avovery, pl. 96. cites S. C.

[38]

And if it chance that the lords of the fee do distrain their tenants for such suits contrary to this act, then, at the complaint of the tenants, the lords be attached to appear in the king's court at a short day, to make answer thereto, and shall have but one effoin therein (if they be within the realm); and immediately the beasts or other distresses taken by this occasion, shall be delivered to the plaintiff, and so shall remain until the plea betwixt them be determined.

*And if the lords of the courts, which took distresses, come not at the day that they were attached, or do not keep the day given to them by effoin, then the sheriff shall be commanded to cause them to come at another day; at which day if they come not, then he shall be commanded to distrain them by all their goods and chattels that they have in the shire, so that the sheriff shall answer to the king of the issues of the said inheritance. And that he have their bodies before our justices at a certain day limited, so that if they come not at that day, the party plaintiff shall go without day, and his beasts or other distresses taken by that colour shall remain delivered, * until the same lord have re-*

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as he cannot take the suit, and be contributory to the suit which he himself takes. —S. R. Suit, pl. 5.

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shall
but
in
162. (D).

in fee of his part his feoffee the other jointenants shall do it, cap. 9. But every tenant and several suits. F. N. B.

5. Quere,

5. Quere, If *A.* holds lands charged with suit to the hundred by prescription, and enfeoffs the king of parcel, if all the suit is gone? F. N. B. 159. (A) in the new notes there.

(C) Remedies for not doing thereof.

1. 52 H. 3. **ENACTS**, that if the tenants after this act with-
cap. 9. s. 2. draw from their lords such suits as they were wont
to do, and which they did before the time of the first voyage of king
Henry into Bretaine, and hitherto used to do, then by like speediness of
justice, as be to limiting of days and awarding of distresses, the lords of
the court shall obtain justice to recover their suits with their da-
mages, in like manner as the tenants should recover theirs.

And this recovering of damages must be understood of withdrawing
from selves, and not of withdrawing from their ancestors.

Nevertheless the lords of the court shall not recover seisin of such
suits against their tenants by default, as they were wont to do.

And touching suits withdrawn before the time aforementioned, let the
common law run as it were wont beforetime.

2. In trespass the defendant justified for amercement, in as much
as the plaintiff held of him of his manor by fealty 2d. of rent,
and suit to his hundred *de tribus septimanis in tres*, &c. And per
Galcoign & Ascue, this suit is only suit service, for which a man
may distrain; but otherwise it is of suit real, as to a leet for resiancy
of which a man cannot be his own judge, and therefore there he
may distrain for the amercement. Br. Suit, pl. 9. cites 8 H. 4. 16.

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any other profit but only appearance in his court. But in the other
case de *sesta ad molendinum*, he shall have other profits by the suit,
the toll of the grain he shall grind there; and for that profit it
seems the action of *sesta ad molendinum* was given, and for
the suit of the court, but only a distress; *tamen quere*. F. N. B.
158. (D)

Kitch. of
Courts, 297.
32. Suit,

5. If there be 2 coparceners of land, for which one suit ought to
be done, and the eldest *After* will not do the suit at the lord's court,
then

then the lord may distrain *the other* * coparcener, as well as the eldest coparcener for that suit; and if the coparceners be distrained, then they *shall have a writ against the eldest sister*, to compel her to do the suit. F. N. B. 159. (E).

cites S. C.
* F. N. B.
159. (E) in
the new
notes there
(c) says he

shall make avowry on her only, and not on both, after a partition by feoffment, &c. See 2 E. 2. Avowry, 184. And see the case, 24 E. 3. 34-73. where the eldest aliened her part to one, and the younger her part to another, and the avowry made on the alienee of the elder only for suit, &c. And so it may be on the alienee of the younger for other suit; yet suit made by one discharges both. And note per Cur. he cannot avow on both in fee after such severance.

24 E. 3. 72

(D) Excuse of not doing Suit.

1. If lord seised of 2 courts, viz. P. and C. and a tenant owes suit to the court of P. and after the tenant has done suit at the court of P. the lord agrees by deed, that for the ease of the tenant, and in consideration of 2s. rent a year, that the tenant shall do suit at the court of C. the which he does for 40 years; and after the lord insists on the suit to be done again at P. it seems that having been seised of the suit at P. the same is still due there; for the doing it at C. was only in allowance of the other suit that was due at P. See Fitzh. tit. Action sur le Statute, pl. 24. cites M. 3 E. 2.

Br. Suita,
pl. 14. cites
S. C.

2. If a man have lands in divers places in the county, and there are several leets, &c. or hundreds, and he is distrained to come unto the leet, or the sheriff's torn, where he is not dwelling or conversant, but is dwelling within the precinct of some other leet

there are very many tenants thereof; and that there is a custom for those copyholders who live remote from the manor, to pay 8d. to the steward, &c. for the use of the lord, and 1d. for himself for entering it, and then should be excused from doing suit for one year after the payment; and alleged, that he lives 10 miles from the manor, and that he tendered the 8d. and the 1d. but that both were refused. And upon demurrer to this replication, Hale Ch. J. said, that it is custom gives the suit, and consequently may qualify it. The

S. C. 101.
M. 3 E. 2. C.
and in M.
101. 512
custom to be
as to such as
lived 10
miles from
the manor;
and that it
was held a
good cus-
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court not being a customary court, but a court baron, in which the free suitors are judges, and so not essential to the court.

Mod. 77. pl. 37. Mich. 22 Car. 2. B. R. Legingham v. Porphery, * S. P. exactly, and says it was averred, that there were 120 copyholders at least that live near the manor. And Hale, Ch. J. said, that surely tender and refusal is all one with payment. And judgment for the † defendant. — 2 Keb. 847. pl. 93. Mich. 23 Car. 2. B. R. Isaake v. Legingham, adjudged for the plaintiff; and cites the case of Porphery v. Legingham, adjudged to be a reasonable custom, and the tender and refusal is all one with payment. — 2 Keb. 851. pl. 105. Isaake v. Legingham, the Attorney-general prayed to stay judgment; but per Cur. judgment for the plaintiff.

[† This seems mis-printed for (plaintiff).]

* [40]

(E) *Suspended or Determined.*

1. **I**F land be held by suit, and parcel of it comes to the lord, the entire suit is extinct and determined; for the lord cannot make contribution of suit to his own court, nor take it. Kitch. of Courts, 299. tit. Suit, cites 34 Aff. 15.

2. If the lord purchases parcel, the whole suit is extinct. Kitch. of Courts, 298. tit. Suit, cites 40 E. 3. fol. 40. by Mowbray, and says, see Litt. fol. 49. for suit cannot be apportioned, because there cannot be contribution.

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court is
Kitch.

Kitch. of
Courts, tit.
Suit, says
the 2 E. 6.
cap. 8. did
not alter the
common
law in this
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suit to the
court; and
cites 20 Aff.
17. that the
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5. If the king has any lands or tenements in ward, during the *surage* of an infant, and the king in Chancery assigns dower unto the wife of the husband, who was father to the ward, of lands holden of other lordships: now if the other lords will distrain the tenant in dower for suit at their court, during the time that the lands are in the king's hands, the wife shall have a writ unto the bailiffs of the other lords, commanding them that they do not distrain her, and recite in the writ all the special matter, and if they have taken any distress, that they deliver it back again. F. N. B. 157. (A).

(F) Suspended or Determined *by Writ de Exoneracione Seclæ.*

1. **T**HIS writ lies where the tenant holds his land to do suit at the county court, hundred, or other court baron, or wapentake, or leet, and he who ought to do the suit is *in ward unto the king, or his committee*; and the lord of whom he holds by such service will distrain him to do his suit at his court, during the time he is in ward unto the king or his committee, his *guardian shall sue this writ* unto the sheriff, or bailiffs of the court, that they do not distrain him, &c. to do suit during the time he is in ward to the king or his committee. F. N. B. 158. (A).

So if the
heir and his
lands be in
the king's
ward; for
lands holden
of the king
in capite;
and after-
wards the
other lords,
of whom
the heir
or his com-
mittee

holds parcel of his lands, will distrain for any service or rent to them due, then the king, or his committee, may sue a writ for them to surcease from such distress. F. N. B. 158. (C).

2. And the *like writ* shall be *for tenant in dower*, where she is endowed in the Chancery of lands which are *in ward to the king*, which lands are *holden of other lords*: now if the other lords will distrain the tenant in dower to do suit for those lands which she holds in dower, she shall have a writ to discharge her. F. N. B. 158. (B).

Also the ten-
ant in
dower [of
lands holden
of the king
in capite]
shall have
such writ,
if the bailiff

of other lords will distrain her for the relief of the heir, or other services, during the time that the heir's lands are in the king's custody, or in the custody of his committee. And it seems, that he may sue this writ directed unto the lord himself, as well as to the bailiffs, or unto them both. F. N. B. 158. (C).

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(G) Pleadings.

1. **I**N a *contra formam assensamenti*, the plaintiff counted upon the deed, and the defendant demanded oyer thereof; but could not have it. F. N. B. 163 (H) cites Mich. 3 E. 2, † Action sur le Case, 5.

† Bohn's
English ed-
itions cite
Actions sur
le Case, 5.
But the
follows,
er

French edition cites the title Actions sur le Statute, 27. where the case is; and it is as follows,

contra formam feoffamenti, against B. & E. his feme, and counted that they distrained him to do suit to the court in C. against the form of the feoffment; whereas neither he nor his ancestors had used to do suit, &c. The defendant prayed that plaintiff shew his deed; but it was said, that he ought not. Then they said, that the plaintiff held of the said B. and E. as of the gift of E. and of the heritage of C. by suit to the said court, whereof the ancestor of C. was seized before the [time of] limitation. The plaintiff replied, Not seized before the [time of] limitation; prist. Whereupon the defendants prayed aid of C. to whom the reversion was, and had it.

2. Avowry by the lord of the hundred, inasmuch as in the same hundred the plaintiff *held a house, by reason of which he owed suit to the hundred de tribus septimanis in tres*, &c. and alleged seisin in him and his ancestors in [of] the tenant and his ancestors, time out of mind. And so see that he did not allege tenure; for *suit to the hundred is without tenure*. Br. Suit, pl. 15. cites 11 E. 3. Fitzh. Avowry, 101.

[42] 3. Cessavit that he held by certain services and *suit to his court at D. held annually at Michaelmas and Easter*; and by the opinion of the Court this *may be intended court baron*, though it be not *suit de tribus septimanis in tres*, &c. for *suit may be as it is reserved at the commencement of the tenure*. Br. Suit, pl. 8. cites 21 E. 4. 25.

For more of Suit of Court in general, see **Coppolds, Courts,**
and other proper titles.

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B. R. The

For more of Summary Proceedings in general, see other proper
titles

terra petita was awarded. Br. Sommons in Terra, pl. 23. cites 25 Edw. 3. Fitzh. Return de Vi. cont, 97.

Mortdance- [2. So in a *mortdanceflor*. 50 Aff. 8. adjudged.]
for by 2, the

one did not come, by which *summons ad sequendum simul* issued, and the *sheriff returned nihil*; and by advice of all the justices it was awarded, that he should be summoned in *terra petita*, quod nota. Br. Sommons in Terra, pl. 3. cites 44 E. 3. 27. — S. P. Br. *ibid.* pl. 35. cites 50 Aff. 8. and yet another's franktenement.

Sec. (C) pl. [3. So in *affize*, the summons shall be upon the land in plaint.
 1. cites S. C. 11 H. 6. 3. b.]

Sec (C) pl. [4. So shall it be in *affize of mortdanceflor*; yet no land is de-
 2. cites S. C. manded thereby. 11 H. 6. 4.]

[5. Same law in a *juris utrum*. 11 H. 6. 4.]

[6. In writ of error against the heir of the recoveror, he ought to be summoned in the land, though the heir has nothing in the land; for he is *privy* to the recovery, and this writ is to defeat the recovery. 10 H. 6. 12. b.]

* S. P. And [7. In * *præcipe quod reddat*, or † other action which demands
 grand cape the land, if the tenant has aid of him in reversion, he shall be sum-
 shall be moned in the land. 10 H. 6. 12. 11 H. 6. 4. b. 38 Aff. 18.
 awarded in terra petita. adjudged, 25 E. 3. 37. b. adjudged.]

Br. Sum-
 mons in Terra, pl. 4. cites 12 H. 4. 14. per Skene. — † In *scire facias* of land, the tenant for life prayed aid of him in reversion, and had it, and *scire facias* issued to warn him; upon which the sheriff returned, that he in reversion has nothing in this county but the reversion of those tenements in which he has warned him: and a good return per Cur. for he shall be warned in *terra petita*; quod nota. And it was upon office found for the king upon which the first *scire facias* issued against the tenant for life. Br. Sommons in Terra, pl. 13. cites 38 Aff. 18. — Br. Return de Briefs, pl. 111. cites S. C. — S. P. And yet it was another's franktenement; quod nota; but the reversion was to the prayee; quod nota. Br. Sommons in Terra, pl. 16. cites 45 E. 3.

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Br. Sum-
 mons in
 Terra, pl.
 13. cites
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Br. Return
 de Brief, pl.

122. cites S. C. But Brooke says, quod quære, because it may be that he is not thereof tenant, and Geo. alias shall sue without amercement of the sheriff.

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[11. But otherwise in writ of covenant upon lease for years; for this is personal. 10 H. 6. 12. b.]

[12. The same law in a *per que servitia*. 10 H. 6. 12. b.]

[13. The same law in *per quem redditum reddit*. 10 H. 6. 12. b.]

[14. The same law in warranty of charters. 10 H. 6. 13.]

[15. In

[15. In a *quid juris clamat* the summons shall be in the land of which the fine was levied. 38 E. 3. 28. b.] *In quid juris clamat* against 2, the one appeared, and the sheriff returned that the other is clericus beneficiatus non habens laicum feodum, and distress shall issue into the same land in the fine. Br. Sommons in Terra, pl. 11. cites 38 E. 3. 28.

[16. In a writ of right of advowson, the summons ought to be in the glebe of the church, though the patron be not seised of it, because it is in demand. 11 H. 6. 3. b.] Br. Return de Brieis, pl. 101. cites S. C. See (A) pl. 1.

[17. In *quare impedit* against the patron, he shall not be summoned in the church; for this writ does not demand it. Dubitatur, 11 H. 6. 3. b.]

[18. In action of waste against a lessee, if he be not seised of the land, he shall not be summoned in the land; for it is not in demand. Contra, 12 H. 4. 4.] In waste, if the tenant is returned nihil, the tenant shall be distrained in terra petita in waste, quas tenet. Br. Sommons in Terra, pl. 4. cites 12 H. 4. 4. Per Skrene. — Contra in writ of waste, quod tenuit; for this is land of another man, in which the tenant now has nothing. Br. Sommons in Terra, pl. 4. cites 12 H. 4. 4. Per Skrene.

[19. If a writ be brought in the county of N. and the tenant vouches J. S. to be summoned in the county of K. and after the entry into the warranty by J. S. the parol demurs without day by demise of the king, and the demandant sues the resummons in N. and the vouchee is returned nihil, he shall be resummoned in the land demanded, because the vouchee is tenant thereof by the warranty. 1 E. 3. 13. b.]

20. If the parol be put without day after the entry into the warranty by the vouchee, he shall be resummoned in the land demanded, because the vouchee is tenant thereof by the warranty. 1 E. 3. 13. b.] Upon resummons the sheriff returned that the defendant is not a terra petita.

tenant, and that nihil. Br. Resummons, p.

21. Contra 1 E. 3. 13. b. is not tenant in the county of N. cites 1 E. 3. 8.

22. In attainder, that he be summoned there; quod tenuit. 21 E. 3. 18.

upon what it arose, in the county of E. where it was tried.

dead, or the like, in as much as it was tried in a county where the land is not. Br. Sommons in Terra, pl. 1. cites 42 E. 3. 19.

Attainder in the county of N. upon a plea of land, but it does not appear upon what it arose, in the county of E. where it was tried.

23. Upon voucher the tenant prayed that the voucher be summoned in this county and two others, and the demandant said that he had assets in this county, and prayed, that he be summoned there only, et non allocatur; but the prayer of the tenant was granted. Br. Sommons in Terra, pl. 19. cites 21 E. 3. 37.

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24. *Præcipe quod reddat in the county of Wilts, at the petit cape the tenant alleged imprisonment at D. in the county of M. and so to issue, which passed for the tenant, by which the demandant brought attain in the county of M. and the sheriffs returned the tenant nihil, by which summons was awarded in the county of Wilts, where the land is; and the inquest was not awarded by default. Br. Sommons in Terra, pl. 20. cites 42 Aff. 14.*

25. *In formedon the tenant vouched the baron & feme, who entered into the warranty and pleaded, and after made default, and after petit cape in terra petita issued. Br. Sommons in Terra, pl. 5. cites 19 H. 6. 51.*

26. *Though in scire facias, and in habere facias seisinam, the summons shall be upon the land; yet in debt upon a recovery of damages in writ of entry sur disseisin, the summons shall be to the person. Per Portington. 22 H. 6. 38. a. pl. 7.*

27. *In action against one as heir the summons shall be in the land which descended; but otherwise it may be in any land whatsoever. Fin. Law, 86. a.*

S. P. In cessavit, and that if the tenant is summoned in other land than is in

28. *If it be to recover the franktenement of the land, the summons shall be in the same land; otherwise if he makes default, he may at the cape wage his law of non-summons; but if he appears, it is not material in what land he be summoned. Fin. Law, 86. a.*

demand, and appears at the summons, he shall not have it for plea; for in whatsoever land he is summoned, so that he appears it is sufficient. Br. Sommons in Terra, pl. 7. cites 37 H. 6. 26. And Brooke says, it is said elsewhere that summons to the person is sufficient, but by this he takes comufance of the land. Ibid.

29. *Judgment by default in dower, and upon a writ of enquiry as objected: sheriff ap-
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words secundum formam statuti, extend far. And Roll, Just. said, that proclamation in one place was good in all. Styl. 67. Mich. 22 Car. Thynn v. Thynn.

(C.) Summons. *By what Thing it ought to be.*

[1.] *In affise attachment shall be made of any thing upon the land.*
11 H. 6. 3. b.]

[2. *But not of the land itself, because the land is not demanded by this writ.* 11 H. 6. 4. *The same law in affise of mortdancestor.*]

3. In *præcipe quod reddat*, if the tenant vouches the bishop to warranty, part of whose temporalities is in the hands of the king, he shall not be summoned in his temporalities, so long as any part of them remain in the hands of the king, though he has sufficient in his hands whereof to be summoned. Br. Sommons in Terra, pl. 17. cites 38 E. 3. 29.

4. Attachment shall be by a mere chattel, which shall be forfeited by default of the party; but it shall not be chattel real, as a lease for years or ward of body, nor by apparel. Br. Attachment, pl. 4. cites 7 H. 6. 9. per Bab.

5. In affise the defendant pleaded, that not attached by 15 days, and the bailiff was examined, who said that he attached him by glebe of the land, and because the attachment ought to be made by moveables or by pledges, or by a thing which may be forfeited by outlawry, and not of glebe, which is parcel of the franktenement. therefore new attachment was awarded; quod nota. Br. Attachment, pl. 1. cites 27 H. 6. 2. & 26 H. 6. Fitzh. Affise, 14.

6. In scire facias, against patron and incumbent, upon a recovery in quare impedit, if the incumbent has no lay fee whereby he may be summoned, the sheriff must summon him by his person, and

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de Brief, pl.
124. cites
S. C.—
S. P. Fin.
Law, 86. a.

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new letter.

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1. b.

at the least; and if any of them do not that which it is returned they ought to do, then the writ is not executed as it ought to be. F. N. B. 97. (C).—S. P. Fin. Law, 86. a.—S. P. 2 Inst. 255. a.—and therefore, if one of the summoners says that the summons was not made, and the other that it was made, the demand

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7. (C) in the new notes the writ, cited 31. 2. 30. 3. 31. and the writ was on the land at the same time, for the same real recovery. F. N. B. 97. (C) in the new note there (c)

to Earl of Leicester v. Heydon, says, there must be 2 sum-
mons. — A summons by one only is not sufficient,
so himself in court, so that there must be two at the least,
and hour, and other circumstances, when they shall be ex-
6. 1. 9. — Black. lib 5. cap. 5. l. 5. p. 333. b. 334

(C. 3) Summons. In Real Actions. How.

This statute 1. 28 E. 1. *IN* * summons, and † attachments in ‡ plea of land, was made † cap. 15. *the summons and attachments from henceforth shall in affirmance of the common law, as law,* contain § the term of 15 days full, at the least, according to the common

by the express words of the statute it appears, contrary to a sudden and misconceived opinion in our books; for Glanvill saith, *summonebitur per intervallum quindecim dierum ad minus*. And therewith agreeth Bracton and Britton, *et si alcun soit resonablement summon, il doit aver space de 15 jours al meynes, de soy garner de son respons*. And Fleta, [lib. 6. cap. 6. §. 11.] saith, *nec etiam sufficit quod summonitio fiat ad statim respondendum, sed decet quod quilibet habeat tempus 15 dierum ante diem litis, & si summonitus minus spatium habuerit, pro illegitima debet reputari, nisi in causis specialibus; ut sunt causæ mercatorum, & cruce signatorum, & hujusmodi quæ instantiam desiderant & celeritatem, &c.* And all these authors wrote before the making of our act. And the author of the Mirror, that wrote of the ancient laws of this realm, speaking of the time of summons, saith, *et reasonable respit al meynes de 15 jours de purveire respons, & de parer en judgment*. And the cause wherefore the common law set down the certain time of 15 days was, for that a day's journey is accounted in law 20 miles, *rationabilis dieta constat ex viginti miliaribus*; for dieta, both in the common and civil law, signifies a day's journey, *continet legalis dieta viginti miliaria*. And therefore 15 days was accounted by the common law a reasonable time of summons or attachment; within which time, wheresoever the court of justice sate in England, the party summoned or attached, wheresoever he dwelt in England, afore the king's writ did come, might per prædictas dietas computatas, by the said account of days journeyes, appear in court, &c. 2 Inst. 567.

† Co. Litt. 134. b. S. P.

The reason of these long delays given in real actions was, (the recovery being so dangerous) that the tenant might the better provide him both of answer and of proofs. But, by consent, they may take other than common days. Co. Litt. 134. b. — By assent of the parties a shorter day was given in *principio quod reddat*. Fitzh. tit. Jour. pl. 17. cites Pasch. 41 E. 3.

* In a writ of *pone to remove a replevin* at the suit of the defendant, the writ saith, *et die præfate querenti, quid sit coram iudiciariis nostris apud Westm.-tali die*; there ought to be a warning by 15 days, for that this (*die querenti*) is in nature of a summons, and so the writ of *venire fac'* for returning of a jury, is in nature of a summons. But this statute extends not to a writ of error, nor to days of *presum*, as upon a foreign voucher in London, and the like. 2 Inst. 567.

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E. R. there it all be a certain day, given at in the assise: for example, the Monday, or the morrow, or in the vintas or quinden of Easter: but it behooves, that the tenant has garnishment by 15 days in the assise, for this statute of assise super replevin does not give any less term, but only in an assise of 11 poor diffusin in B. R. C. B. or in 10. 2 Inst. 568.

†† Note, that in B. R. they allowed attachment in case of novel diffusin of 8 days and less; quod nota. Br. Attachment, pl. 13. cites 22 Aff. 79. — S. P. F. N. B. 177. (D)

This branch, as to B. R. is as to be in affirmance of the common law; for in criminal cases, which concern the life of man, if a man be indicted of treason or felony in the county where B. R. doth sit, the process

venire fac' for the returning of the jury need not have 15 days between the teste and the return; may, the entry may be *ideo immediate venit inde jurata, &c.* But if the indictment be taken in any other county, and removed into B. R. there ought to be 15 days between the teste of the *venire fac'* and the return. 2 Inst. 568.

Commissioners of oyer and terminer may in case of treason, felony, misprision, trespass, &c. try the prisoner the same day they award the *venire fac'*, as by divers precedents, ancient and late, do appear: but the commissioners must make a precept in parchment, under their seals, for the returning of a jury immediately the same day, if they will, or any day after. And likewise justices of gaol delivery, or justices of peace, may try the prisoner the same day, or any day after; but need not make any particular precept. For the justices of gaol delivery, and justices of the peace, make a general precept in parchment under their seals for the summons of the sessions, and for return of juries, &c. and therefore any particular precept is not requisite. There was a general summons made 40 days before the sitting of the justices in eyre. 2 Inst. 568.

¶ The printed books leave out (or before the justices of the common bench), which ought to be added. 2 Inst. 567.

2. Si *summonitio omnino dedicta sit, & petens se teneat ad defaultam, vocandi sunt summonitores, ut testificentur summonitionem, & cum diligentur examinati concordēs inveniantur summ' testificantes tunc primo vadiat summonitus legem, per quam se defendat contra summonitorum testificationem, & non solum quod summonitus non fuit in propria persona, sed quod nulla summonitio venit ad ipsum nec ad domum neq; ad familiam per quam inde fuerit prænuntius ante diem litis. Si autem summonitores in probatione summonitionis discordes inveniantur, non habebit summonitus necesse ulterius defendere sum' sed dabitur ei alius dies in cur. nisi tunc gratis voluerit respondere. Fleta, lib. 6. cap. 6. f. 12 & 13.*

3. Summons upon grand cape, and other summons, shall be served 15 days before the first day of the return of the writs; but 15 days before the fourth day of the return is not sufficient; and because it wanted 4 days of the 15 before the first day of the return, the demandant could not recover seisin of the land. Br. S.

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reason it must be of his own proper goods, and not of such as are lent or pledged to him. And the sheriff may either take them with him, or leave them with the party as he please; but be it which it will, the property is not out of the party till he makes default. Fin. Law, 94. a. b.

9. To prove a summons of the tenant, there ought to be 2 or 3 witnesses. Co. Litt. 6. b.

• [49]

See Disceit (A) pl. 1. — If the parish extends into 2 counties, and the land lies in the parish in one county, and the church in the other county, the proclamation ought to be made in the church, in the same manner as if all the parish was in one

10. 31 Eliz. cap. 3. s. 2. For the avoiding of secret summons in all real actions, without convenient notice of the tenants of the freehold, be it also ordained and enacted by the authority of this present parliament, that after every summons upon the land in any real action, 14 days at the least before the day of the return thereof, proclamation of the summons shall be made on a Sunday, in form aforesaid, at or near to the most usual door of the churches or chapel of that town or parish where the land, whereupon the summons was made, does lie, and that proclamation so made as aforesaid shall be returned, together with the names of the summoners.

And if such summons shall not be proclaimed and returned, according to the tenor and meaning of this act, then no grand cape to be awarded, but an alias and pluries summons, as the cause shall require, until a summons and proclamation shall be duly made and returned, according to the tenor and meaning of this act.

county; and the sheriff of the county where the original writ is brought, shall make the proclamation in the other county at the church there, and has sufficient warrant to do it by the said statute, though he be not sheriff of the county where the church is. And. 278. pl. 286. Trin. 34 Eliz. Anon.

But if there be no church in the parish, the summons by the common law is sufficient; for it was not the intent to have summons at the church where there is no church; and so it seems when there is no sermon nor prayers, means between the delivery of the writ to the sheriff, and the return or time limited in the statute. And. 278. pl. 286. Trin. 34 Eliz. Anon.

So if the land lies in 4 parishes, and there is no church in one of them, it is sufficient to make proclamation where the church is in which parish the summons is made. And. 278. Trin. 34 Eliz. Anon.

And if there be a church in every parish, proclamation need not be made at all the churches; but if it be made at any of the churches, it is sufficient. Brownl. 126. Allen v. Walter. — S. C. Hob. 133. Per the common law, are, for avoiding this one proclamation towns, and so th before the return the summoners, th tion made by the

But where he Allen v. Walter — For he ought to say what. Brownl. 126. S. C.

It was moved to set aside the grand cape, proclamation not having been made 14 days before the return of the summons according to the statute 31 Eliz. cap. 3. s. 2. the summons was returnable crast. Animar. and proclamation made October 27, which was but 6 days before the return; the Court made a rule to shew cause, which was afterwards made absolute. Barnes's note. in C. B. r. East. 8 Geo. 2. Freeman v. Cannon. — Rep. of Pract. in C. B. 115. Freeman v. Cannon, S. C. No defence being made, the rule was made absolute, on affidavit of service.

11 In summons in real actions, the summoners, in the presence of the persons, veyors, &c. ought to summon the tenant, 1st, to keep his day, and come in certainty to render, &c. 2dly, They ought to name the name of the demandant, &c. 3dly, They ought to name the land in demand. 6 Rep. 54. b. cites 3 E. 3. 48. 43 E. 3. 32. a. 50 E. 3. 46. b.

12. Disceit for non-summons in a formedon in remainder; the summoners and veyors were examined by the Court, as it was held they ought to be, and not by the clerks, whether they spoke the words, or the bailiff, and at what time; and it appeared they did it after sun-set: and by all the Court, the summons was not well made. Cro. E. 42. pl. 2. Mich. 27 & 28 Eliz. C. B. Greene v. Ardene.

(C. 4) Summons. In other than Real Actions. Good.

1. SUMMONS to appear on Friday the 17th of April, where Tuesday is the 17th, is as no summons; for the time being impossible, it was the same thing as if there had been no summons. And when one day is set forth in the conviction, as that he was summoned to appear, and by virtue thereof did appear on Friday the 17th, &c. his appearance cannot be intended on another day; and for that reason a conviction was quashed. 1 Salk. 181. pl. 1. Trin. 2 Ann. B. R. The Queen v. Dyer.

6 Mod. 41. S. C. accordingly. — S. C. cited 8 Mod. 378. Trin. 11 Geo. in case of the King v. Venables.

(C. 5) Necessary. In what Cases. In other than Real Actions.

[50] See Trespass, (B. 2)

1. WHERE a copias issues out of an inferior court, and no summons was first issued, false imprisonment lies upon the arrest. Vent. 220. Trin. 24 Car. 2. B. R. Read v. Wilmot.

Cited by Powell J. & Lutw. 1565, and denied.

2. Summons where the defendant is at a distant place of residence. See Glide's case cited JAMES for a particular circumstance of the case. the MORTON be and a return of the opinion of the

at 4 Mod. 33-37. Trin. 3 & 4 W. & M. in R. R. the City of Exeter v. Glido, and particular summons then to allege the words of the other 7 Will. 3. one res v. Wiltshire, both of which no-justices to the King S. C.

3. D. embrasili

2 Salk. 18 pl. 1. S. C. accordingly. — 6 Mod. 96. S. C. but not S. C.

of common right the party ought to be summoned, if possible; and it would be well to set forth, that he was summoned, and appeared, or did not appear, or could not be found to be summoned; and though the act of parliament orders the offender should be convicted, yet that must be intended after summons, that he

may

may have an opportunity of making his defence; and it is abominable to convict a man behind his back. And all the Court agreed, that of common right there ought to be a summons. 6 Mod. 41. Mich. 2 Ann. B. R. *The Queen v. Dyer.*

2 Bernard. 4. An order of bastardy was quashed, for not setting forth that
Rep. in B. the party was duly summoned; for it is *against the law* of Eng-
R. 241. 261. land, *that a man should be impeached without notice to make his de-*
282. in case fence. 8 Mod. 3. Mich. 7 Geo. *The King v. Glegg.*

v. Cotton,
Pasc. 6 Geo. 2. cites the case of the King v. Gregg, Mich. 13 Geo. 1. and in the case of the King
v. HOLLAND, Trin. 5 Geo. 2. and the case of the Queen v. Squire, and of the King v. Allington.

5. Where a *mandamus* was directed to the chancellor, &c. of the university of Cambridge, to *restore Dr. Bentley to his academical degrees*, to which a return was made, but no mention therein that the doctor was summoned, nor did the return set forth that the proceedings in the vice chancellor's court, or the congregation, are according to the rules of the civil law, and therefore the return was held ill, and that therefore the proceedings must be intended to be agreeable to the rules of the common law; and if so, it not appearing that the party has any relief by applying to another Court, this Court will relieve him, if he has been proceeded against and degraded without being heard, which is contrary to natural justice. And therefore a peremptory *mandamus* was granted. 2 Ld. Raym. Rep. 1334. Hill. 10 Geo. *The King v. the Chancellor, &c. of Cambridge University.*

* [51] 6. Exception was taken to an *order of sessions* made to hinder
A summons need not be mentioned in an order of justices, where they have jurisdiction; but if they proceed without summoning the party, it is punishable by information. 2 Ld. Raym. Rep. 1407n accordingly, as to its not being ne-
the defendant from selling ale, that it did not appear that the defendant was summoned. To this it was answered, that it is true a summons had been necessary, if the statute had not given the sessions, or two justices, an absolute * power to put down alehouses at their discretion; but that *where they have an unlimited power, it is not necessary to set forth any summons in their order, neither is a summons ever, or the like, set forth that the* bastardy. 8 N
deer-stealing, is usual to set o in orders for g v. Austin.
Mod. 377. S. C.

(D) Summons. Attachment. *By the Goods of whom one may be attached.*

No goods shall be attached, but the proper goods of the party, and not goods pledged nor goods borrowed. Br. Attachment, p. 20. cites 35 H. 6. 25.
[1.] If B. has goods of A. in his possession, B. may be attached by these goods; for B. is charged to render it to A. 11 H. 4. 90. b.]
[2. In

[2. In an action against baron and feme, the *feme*, because she has no goods, ought to be attached by the goods of *the baron*. *Contra*, 7 H. 6. 9. b.] Fitzh. tit. Attachment, pl. 2. cites Mich. 7 H. 6. 9.

that she may be attached by the goods of the baron——And *ibid.* pl. 4. cites Trin. 26 H. 6. accordingly.——Fitzh. tit. Forfeiture, pl. 17. S. P. admitted, cites Mich. 2 E. 2.

[3. So in action against the sovereign and his commoigne, the *commoigne* ought to be attached by the goods of *the sovereign*. 7 H. 6. 10.] Fitzh. tit. Attachment, pl. 2. cites Mich. 7 H. 6. 9.

——S. P. accordingly.

(E) Summons and Severance. *In what Actions* See (I. 2.) it lies.

[1.] T lies in action of *waste*, because the land is to be recovered. 48 E. 3. 32. 2 H. 4. 2.] Br. Summons and Severance,

pl. 9. (his) cites S. C.——S. P. Br. Waste, pl. 29. cites 42 E. 3. 21, 22.——S. P. For the writ is ad exhibicionem, and the action of waste is a plea real: in an action of waste brought by 2 in the tenet, a release of the one is a bar to both; but otherwise it is in the tenet; for there it bars but himself. 1 Inst. 307.

[2. It lies in *quare impedit*. 11 H. 6. 23. b. * 55. adjudged, 21 E. 3. 38. b.] It lies in quare impedit, and in a

writ of error upon it. Cro. E. 324. pl. 16. Pasch. 36 Eliz. B. R. Pipe v. the Queen.——* Br. Summons and Severance, pl. 21. cites S. C.——In *quare impedit* by 2, if they vary in count, there the defendant may plead it to the count, and the writ shall abate; per Littleton and others, and they shall not be severed. Br. Count, pl. 66. cites 6 E. 4. 10.

† Br. Summons and Severance, pl. 13. cites S. C. /

[3. But the other shall have the *suit of the whole*. *Contra*, 21 E. 3. 38.

[4. It lies
his compani
30 E. 3. 30.
45 E. 3. 2.]

34 H. 6. 31. &
§ Br. Summo

Jenk. 24.
pl. 46.
† Br. Sum-
mons and
Severance,
pl. 2. cites
S. C.

[5. So in
cause it is se
[6. So it l
[7. It lies
recover a wa]

Fitzh. tit. Sever
in detinue of char
pl. 12. is to the contrary.

* S. P. Br. Summons and Severance, pl. 2. cites 24 H. 6. 31. & 35 H. 6. 19.

[52]

Br. Summons
& Severance,
pl. 2. cites
Fitzh. tit. Se-
verance in
that First

[8. It does not lie in *quid juris clamat*. 48 E. 3. 32.]

of Read v. Redman; but the nonsuit of the one displs or the nonsuit of the other, for the tenant shall not be compelled to assent to one only.

20 Rep.
134. In re

[9. It

[9. In *forgery of false deeds* summons and severance does not lie. 18 H. 6. 6.]

* S. P. Br. [10. It lies in action of * *debt by executors*. 10 H. 6. 2. b.]

Summons

and Severance, pl. 1. cites 25 H. 6. 3. — S. P. ibid. pl. 2. cites 34 H. 6. 31, and 38 H. 6. 19. — S. P. 10 Rep. 134. Pasch. 10 Jac. C. B. Redman v. Read.

Trover and conversion by 3 executors against the defendant, for a bond,

[11. It lies in action of *trespass by executors of the goods of the testator taken*. 14 H. 4. 29.]

[12. But otherwise it is if it be *quare bona sua cepit*. 14 H. 4. 29. b.]

and declare, that it was *lost in the testator's life-time*, but lay the *conversion since his death*; two of the plaintiffs were summoned and severed, and non' pros' entered as to them; to the 3d the defendant pleaded not guilty, and found against him, and 500l. damages. Upon motion in arrest of judgment, it was held by Hale Ch. B. and the whole Court, that summons and severance did not lie in this case, because the conversion, which is the most material part of the declaration, was in the executor's own time, so that the action was grounded on their possession, as *trespass of their own possession*, in which case summons and severance does not lie, and consequently the nonsuit of one is the nonsuit of all, and all the proceedings after are to no purpose. And per Hale chief baron, there are *two sorts of severances*, one when a plaintiff will not appear, and the other, when all appear, but some one or more will not proceed and prosecute, there he or they shall be severed by order of Court. Hard. 327. pl. 11. Mich. 14 Car. 2. in the Exchequer. Manly v. Lovel.

It was held that *attaint* shall ensue the nature of the action upon which it is founded, so that, if summons

13. *Attaint by three*, they were essoigned at the first day, and at the day of adjournment of the essoign, two did not come, by which summons ad sequend' simul was awarded, and no other thing against them, &c. But it does not appear upon what action the attaint was founded. Br. Sommons and Severance, pl. 15. cites 7 Aff. 8.

and severance lie in the first action, it shall lie in the attaint, and otherwise not. Br. Sommons and Severance, pl. 2. cites 34 H. 6. 31 & 35 H. 6. 19. — Therefore, where it is brought upon *formoden*, or such like, severance lies; contra where it is founded upon *trespass, conspiracy*, and such *actions personal*; there if it be brought by two, and the one will not sue, this shall be the nonsuit of both. Ibid.

Affise by two, the one did not come, by which summons ad sequend' simul if *justicia*, by which default as before, nothing but *revisum* mul was awarded *precipe quod redi*

14. *Affise by 8 daughters*, 5 are nonsuited, or will not sue, they shall be summoned and severed; quod nota. Br. Sommons and Severance, pl. 16. cites 10 E. 3.

not coming of the other not, but made a-attachment did in ad sequend' &c. — S. P. in

* [53] If judgment be had against two, and one would bring a writ of error and the other will not join, he should be summoned & severed, and if he brings a writ alone, it is not good. Both. 7

upon writ of after two of were severed by award without process. And so see that the severance lies in writ of error founded * upon a personal action. Brooke says the reason seems to be in as much as the plaintiffs in the writ of error made default in the writ of ravishment of ward, and so in a manner they are by way of defence, in which case the act of the one shall not prejudice the other in action personal, contra of the plaintiff in action personal; for the nonsuit or release of the one goes against both. Br. Sommons and Severance, pl. 19. cites 29 Aff. 35.

1 Jan. 3 Jac. 2 B. R. Hasket v. Herne. — 3 Mod. 134. S. C.

In *folle judgment*, one of the plaintiffs, who before had appeared, was nonsuit and severed. D. 262. b. pl. 32.

16. *Champerty* by two against one who maintained in *scire facias* upon a recognizance brought by the plaintiff for the part of J. N. The one plaintiff was nonsuited, and it was awarded the nonsuit of both, and that severance does not lie; *contra* by some, if the action had been founded upon a real action. But Brooke says, it seems that all is one; for a man shall recover only damages in this action; *contra* of attain; for by attain upon a real action, a man shall be restored to the land, and so recover land; but *contra* in champerty. Note the diversity. Br. Sommons and Severance, pl. 7. cites 44 E. 3. 6.

In *champerty* founded upon a personal action, summons and severance does not lie; per tot Cur. But per Finch. it lies in this action where it is founded upon a

real action. Brooke says, *quære inde*; for it seems that it does not; for it is not like to writ of error or attain, which shall reverse the first action; for this action of champerty is only to recover damages or penalty against the party defendant; for the writ at the suit of the party, says, *ad grave damnum*, &c. Br. Sommons and Severance, pl. 20. cites 47 Aff. 3.

17. It lies in writ of *cofinage*. Br. Judgment, pl. 144. cites 10 H. 6. 9, 10.

18. It was agreed *arguendo*, that in *audita querela* brought by two, upon a release made to them, if the one will not sue, the other shall sue alone, and he who makes default shall be severed; and the reason seems to be, inasmuch as they are by way of defence; and of the part of the defendant, the default of the one shall be the default of both. Br. Sommons and Severance, pl. 2. cites 34 H. 6. 31. & 35 H. 6. 19.

19. It lies in writ of *intrusion*, *ravishment of ward*, and other like cases, as *ejectment*, &c. where a man is to recover the thing itself which is in demand. Per Vavisor. Kelw. 47. b. pl. 4. Mich. 18 H. 7. Anon.

20. In a *nativus habendo* summons and severance lies not. But in a *liber*

21. In
and the
F. N. B.

22. In
partner
moned a
one was for
Obit, pl. 1

* *Nuper*
obit by 2
against the
third, the
Br. Nuper

23. S
he that
the whole. Jenk. 211. pl. 46.

24. In an *affize of nuisance* summons and severance lies Godb. 59. pl. 70. Mich. 28 & 29 Eliz. 3. R. in Giles's case.

25. And therefore it lies in an action on the *case quare exaltavit flagitum*, *per quid praeiudicium suum inundationem fecit*. Godb. 59. Giles's case.

(E. 2) At what Time.

1. **S**UMMONS and severance is always *before appearance*, and non-suit after appearance, where the severance is without process, &c. 10 Rep. 135. 2. In a note by the reporter, at the end of the case of Read v. Redman, cites 38 Aff. 39. 26 Aff. pl. 35.

L. P. R.
tit. Sum-
mons and
Severance,
cites 6 W. &
M. in B. R.
that sum-
mons and
severance
was after
joinder in the
assignment of
errors.

2. Error was brought of a judgment in ejectment against 2 defendants; and afterwards one of the plaintiffs in error gave a release to the defendant in error, who pleaded it in bar as a plea puis darraign continuance. It was insisted upon demurer, that *after in nullo est erratum* pleaded, there cannot be any summons and severance; and resolved, that the release should bar him only that released Cro. J. 117. pl. 5. Pasch. 4 Jac. B. R. in case of Blunt and Farley v. Sneddon.

(E. 3) Necessary. In what Cases.

1. **A** Writ of error to reverse a judgment given against 20, was brought by them all; but only one of them appeared, and the others *exacti non venerunt*. Afterwards the one assigned errors alone. It was held, that the assignment of errors of the one only, per se, without suing a summons and severance of the other 19, is as null and void; and the writ was abated, and execution awarded. Cro. E. 891. pl. 8. Trin. 44. Eliz. B. R. Andrews v. Lord Cromwell.

(F.) Severance. In what Cases it lies.

[1. **I**N such cases, where men may have several actions, if they join in an action, there shall be no severance for their folly. 7 H. 4. 45. b.]

[2. As if several are out-lawed a writ of error, there cannot be severance, because they might have had several

by join in
because

Br. Sum-
mons and
Severance,
pl. 11. cites
S. C. Con-
tra in præcipe quod reddat. — Writ of error to re-
both the parties outlawed; and if one only appear, the
benefit of law that appears only. Per Cur. 2 Salk. 496. pl. 7. Pasch. 4 Ann. B. R. Symmonds v.
Bingoc and Cook.

the names of
for the be-

But when
they plead a
joint plea, as
release, or
the like,
which is
found against
them in ac-
tion person-
al, there of
necessity they

3. in conspiracy against two, the one pleaded not guilty, and the other another plea; and the jury passed against them to the damage of 100l. The one brought attain alone, and it was adjudged, that it lay well of the principal; but he was compelled to abridge his demand of the damages; for as to the principal, their plea was several, and therefore may sever in attain; but the damages were entire, therefore he shall abridge as to this, though he has paid the whole, and made surmise of it: for the Court shall

shall intend that both have paid it, according to the form of the judgment. Br. Summons and Severance, pl. 2. cites 34 H. 6. 31. & 35 H. 6. 19. *shall join; and yet there, if the one will not sue, severance does not lie. Ibid.*

4. Where a man leases land for life, and has issue two daughters, and dies, and the one takes baron, and the tenant grants to her and her baron all his estate, this is no surrender; per Vavisor, J. clearly. And if they do waste, the action of waste shall be brought in all their names, and the baron and feme shall be summoned and severed. Br. Summons and Severance, pl. 14. cites 21 H. 7. 40.

5. Error in C. B. was brought by several defendants; the defendant in error pleads the release of one of the plaintiffs only. This is a good bar against the releasor, but not against the others; and therefore there ought to be a summons and severance, and for that reason judgment reversed nisi, &c. Cumb. 95. Mich. 4 Jac. 2. B. R. Croket v. Daniel, cites 2 Cro. 116. Blunt's case.

The writ of error shall follow the nature of the first action; so that if summons and severance lies

the first action, then the release of one defendant in a writ of error brought on such action is a release of the other defendant. Godb. 59. pl. 70. Mich. 28 & 29 Elis. B. R. Giles's case.

(G) *At what Time.* In what Cases there shall be Severance without Writ of Summons ad sequendum simul.

[1. *AFTER* appearance made by 2 jointenants plaintiffs, if one makes default he shall be severed immediately without suing summons ad sequendum. * 2 H. 4. 23. b.]

A writ of error in assise was brought by several. One prayed process one appearance &c. Yelv. 40.

plaintiff in error of ad sequendum firmi there can be no judgment. 44 Elis. 1 * Br. Summons

[2. But not 2 H. 4. 23. b]

Br. Summons and cites S. C.

(H) What

[1. THE] 4. 2

surcease from taking the inquest, and the justices of the bench, who have the record, for want; and others in a contrary opinion, therefore question. And Brooke says the taking of the inquest. Br. Summons and Severance

(I) Summons and Severance. What Persons shall be summoned and severed

[1. If executors bring writ of replevin, and one is nonfined, the shall be summoned and severed. 14 H. 6. 9. b.]

[2. 3]

[2. So if one releases he shall be severed. 10 H. 6. 9. b.]

So if 4 joint-
debtors bring
quære impedit

[3. In *quære impedit* by coparceners, they may be summoned and severed. 38 E. 3. 35. adjudged.]
die, and the one will not sue, he shall be summoned and severed, but if he will vary in title, there the writ shall abate without remedy; for then it appears that they have joined upon several titles; quod nota. Br. Quære Impedit, pl. 2. cites 26 H. 8. 5.

[4. If 2 executors sue execution of damages recovered by testator, summons and severance lies. 31 E. 3. 13. b.]

But it lies
not of tres-
pass of their
own possession.

[5. So in action of trespass by executors, of the goods of the testator taken, summons and severance lies. 14 H. 4. 29.]

Hard. 318. Manley v. Lovell.——Co. Litt. 139. a. (h) is, that it lies for goods taken out of their own possession.

It lies in
account, as
executors,
by the receipt of their own hands.

[6. So in an *account* by executors against by the bailee of their testator, summons and severance lies. 20 E. 3. Account, 78. adjudged.]

Co. Litt. 139. a. (h).

* S. P. Br. Summons and Severance, pl. 9. cites 48 E. 3. 14. Brooke says, And so see Severance in action personal by executors. Contra by other men in action personal.——S. P. Ibid. pl. 2. cites 34 H. 6. 31. and 35 H. 6. 19.

See (E), pl.
30, 11, 12.
—(I), pl. 4.
5, 6.

(I. 2.) *Executors.* In what Cases and Actions they may be summoned and severed.

Br. Sum-
mons and
Severance,
pl. 3. cites
S. C.

1. **D**EBT by 2 executors, excommunication was pleaded in the one, by which he was demanded, and did not come; wherefore he was severed by award, and the other admitted to sue alone: And so see that both did not sue; quod nota. Br. Executor, pl. 30. cites 42 E. 3. 13.

Otherwise it
is in writ of
debt brought
by another
person; the
reason seems
to be inas-
much as the
executor
may be summoned and sev-

2. Debt by 2 executors, the defendant was outlawed, and sued
charter of
served, by
the one, a
pluries, at
him only.
r who was not
served against
iff prayed scut
to count against

Ibid.

3. In:
be severed
pl. 156.

fault, he shall
Br. Executors,
pl. 10.

4. In debt for arrears of annuity granted by deed to the testator, summons and severance lies for the executors. Keilw. 47. b.

[57] Mich. 18 H. 7.

No sum-
mons and
severance
lies in per-
sonal actions:

5. In personal actions pro qua. by executors, there shall be summons and severance; because the best shall be taken for the benefit of the dead. Co. Litt. 139. a. (h)

as if trespass be committed, in such case jointenants may both join in the action; for as one may release the whole, so the other may release his part, and the other cannot recover his part of the damage without him. And so in debt, be an obligor or to a, there can be no summons and severance; because one of the joint obligors may release the bond, and therefore may not join in the action. But if a man appoints a co-executor, there shall be summons and severance, because though one of the executors may release,

release, though such a release is a devastavit in him, yet if he will not proceed at law, it is no devastavit; and therefore both executors, being only trustees for the person deceased, they shall not both be compelled to go on together; but if one refuses, the other may bring his action in the name of both, and have summons and severance; for otherwise each co-executor might, by collusion with the debtor, and not proceeding, keep the other from recovering the assets, and not create a devastavit in himself. But after such summons and severance he does not proceed for the moiety, as in real actions; but he proceeds in that action as the whole representative of the testator, and is entitled to the whole as the testator was in his lifetime. G. Hist. C. B. 196, 197.—S. P. Cart. 191. cites 9 Rep. 37. Hendloe's case, 7 H. 4. 18.

(K) How it shall be made. In what Cases, without Process.

- [1.] **I**N a right of ward by two, if the one be nonsuited after that he has appeared, he shall be severed without process. 38 E. 3. S. P. but after appearance, there shall be process. b. adjudged.] Br. Summons and Severance, pl. 12. cites S. G.

2. Summons and severance lies between executor's plaintiffs; and if one be outlawed or excommunicated, he may be demanded; and if he comes not, shall be severed by an award without process, after he hath appeared, and the other shall proceed without him; but if he has not appeared, then summons and severance shall issue out against him. Brownl. 37. in an anonymous case.

(L) How the Process shall be, before Severance.

- [1.] **I**N formedon, if summons ad sequendum simul issues, the grand cape shall go of the whole, and not of a moiety, till the severance comes. 17 E. 3. 36.]

2. If two sue scire facias of the land, and the one makes default, summons ad sequendum that upon aid and return shall issue. Br. Summons & Severance, pl. 1. cites 28 H. 6. 3. S. P. in the first case, 1

3. Debt by 2 summoned and be awarded, an award shall be made or the process determined by out'swory against the defendant; and he shall not be severed till he be summoned. Br. Summons and Severance, pl. 1. cites 28 H. 6. 3. S. P. in the first case, 1

4. As in praecipe quod reddat by two, if the one will not sue at the day of return, and the tenant makes default, there summons ad sequendum shall issue, and grand cape of the whole land, quod reddat negatur. Br. Summons and Severance, pl. 1. cites 28 H. 6. 3. S. P. in the first case, 1

5. There are 2 sorts of severances, 1. When the plaintiff will not appear, there he shall be summoned and severed. 2. When all appear; but some one or more will not prosecute, there he or they shall be severed by order of court. Per Hale Ch. B. Hard. 318. Mich. 14 Car. 2. in Scacc. in case of Manly & al' v. Lovell.

(M) *Pleadings. And in what Cases the Writ shall abate before or after Severance.*

And if 2 jointenants are disseised, and the one re-purchases the whole,

the other shall have assise in name of both, and the purchaser shall be summoned and severed. Br. Summons and Severance, pl. 17. cites 23 Ass. 9.

1. **I**N assise, if there are 4 jointenants, and two disseise two, they shall have assise in name of the four; and the two shall be summoned and severed. Br. Summons and Severance, pl. 17. cites 23 Ass. 9.

2. In assise against 3 daughters, it was found, that 2 made the disseisin, and the third not, and all three brought attain, and she who did nothing was severed; and the defendant pleaded to the writ, because the third, who was acquitted, and had no cause, nor was not grieved, was joined with the other two; and therefore the writ was abated; quod mirum, after severance. Br. Brief, pl. 294. cites 29 Ass. 14.—and see thereof 39 E. 3. & 11 H. 4. 26. 27.

So in writ of account, brought by the executors of the Earl of Salisbury, it was pleaded, the writ, &c. It was award, &c. Fitzh. ti

But in debt by two defendant pleaded in at Pasch. 10 Jac. C. B.

* Went. Off. of E.

3. A writ of debt was brought by 2 executors. Defendant pleaded, that one was dead. Plaintiff replied, that he that died was severed. But the writ was abated. Br. Brief, pl. 136. cites 39 E. 3. 11. Contra * 16 E. 3.

is dead. Judgment of the writ was abated by

is severed, died. The abate. 10 Rep. 134.

4. at the, was no severed by any law

by reason of the severance; for otherwise it shall abate against all. And now for the moiety it remains good. Br. Brief, pl. 225. cites 39 E. 3. 16.

who vouched, and did not come, but that the other be and was severed severed has taken good, quod nota,

Br. Carde, pl. 13. cites S. C. cited 2 Rep. 68. n. b. Hill. 47 E. 2 in Toker's ad.

5. Ward by 2, and counted, that the tenant held of their ancestor, and conveyed the descent to them; the defendant said, that there is one R. in full life, not named, to whom the feignery descended with the plaintiff. Judgment of the writ. Belk. said, this R. has released the tenant, against whom the writ is brought, and so the action

is given to us two alone. But Cand. said, You ought to have joined all three, and after * R. should have been summoned and severed. Finch. said, If you had counted that he held of yourselves, and had not mentioned the descent, then it had been good without R. But now, by mentioning the descent, R. ought to be named, and summoned, and severed, and the 2 shall recover the whole, and the other may have account against them. Br. Summons and Severance, pl. 5. cites 45 E. 3. 10.

6. Where two lords are, and the one releases to the other, and he comes to distrain, and the tenant offers but a moiety of the rent, he shall take the distress. Per Wych. Br. Summons and Severance, pl. 5. cites 45 E. 3. 10.

7. Three leased for life, and 2 released to the third, and he brought waste alone, supposing that he leased; and the tenant shewed deed that the three leased, judgment of the writ; and the other pleaded the release of the two, and the writ awarded good; for whereas three leased, therefore the one leased. Br. Summons and Severance, pl. 6. cites 46 E. 3. 17.

8. Assise by 2 barons and their femes by title of coparcenary, and the one baron and feme were summoned and severed, and the tenant pleaded to the writ, because the baron who was severed was alien born; et non allocatur, but the writ awarded good. Contrary it seems, if he had not been severed. Br. Brief, pl. 120. cites 11 H. 4. 26.

9. For the better understanding the true reason of the law in the cases of summons and severance, these diversities are to be observed: 1st, Between writs real original, and writs real judicial; for if 2 coparceners or jointenants bring an original real action, and one is summoned and severed, and dies, the writ shall abate; for in a real action

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writ by such acts (where there is not any summons and severance) become abatable only. 3dly, The diversity is between actions real, concerning freehold or inheritance, without any regard to the survivor, and actions merely personal, or next with the realty, in which chattels or things entire are demanded, where, if one plaintiff be summoned and severed (where the thing intire survives to the other) the writ shall not abate; as in writ of ward of the body, according to 37 H. 6. 11. 38 E. 3. 35, 36, &c. 10 Rep. 124. a. b. in case of Read v. Redman.

10. *In quare impedit* in some cases, the death of one of the plaintiffs shall not abate the writ *without any severance*, viz. *where otherwise the surviving plaintiff would be without any remedy*, &c. as upon plenary, and 6 months passed, where lapse shall incur, which reason perhaps may reconcile all the books, which *prima facie* seem to differ; and this is the reason given in some of the books, as in 38 E. 3. 36. 9 H. 6. 30. &c. that otherwise the tort done to the plaintiff will be dispunished, and the survivor lose his presentation by lapse, and perhaps his inheritance. As where 2 purchase advowson in fee, and a stranger usurps; but where after the death of one the survivor may have a new writ without any prejudice to him, there in some of the books the writ has abated, but without question, if one be summoned and severed, and dies, the writ shall not abate. 10 Rep. 134. b. in case of *Read v. Redman*.

[60] (N) *What the Party severed may do after Severance.*

Several books say, that after judgment he who was summoned and severed may sue execution.

Went. Off.

Exec. 104. cites 13 E. 3. Fitzh. Execution, 9. 11 R. 2. Privilege, 1. but adds *quare* thereof; for he cannot acknowledge satisfaction, as hath been since resolved, Mich. 14 & 15 Eliz. Dy. And the reason thereof being because he is no party to the judgment, by the same reason can he not sue execution upon it; for how can he have execution for whom there is no judgment given? Now the recovery of judgment had he not, though at any 2 precedent temp. Ball account, the 14, 15. But this to be had after the *ay adjudged*, [and executor who professes by a release?]

1. **I**N debt by two executors, one of them is summoned and severed, and the other *proceeds to judgment*; in such case he who was severed shall not be received to *acknowledge satisfaction* of the debt, because he has no day, nor is privy to the judgment, but secluded from it; and yet if he had made a *release before the judgment*, it should have been a bar, notwithstanding the severance. D. 319. b. pl. 15. Mich. 14 & 15 Eliz. Anon.

(O)

Severance.

1. **I**N *ward* by 2, if the one is summoned and severed, the other shall recover the whole ward; for this cannot be severed; per Finch. Br. Judgment, pl. 167. cites 45 E. 3. 10.

2. *Debt by 6 executors, on a bond to testator*, 3 of them were summoned and severed, and the other *proceeded and had judgment*; and upon a writ of error brought it was objected, that there is no mention of those who were severed; for that they being still executors, ought to be named in the judgment. Precedents were ordered to be searched in C. B. as to the course there, whether upon summons and severance judgment should be for those only which

which prosecuted; which they certified to be so. And the Court, (absente Brampston,) held it a good course; for perhaps the ex-ecutors which are severed never proved the testament, nor never will either prove it, or administer; so that when they are named in the writ, and would not join, it is reasonable that judgment should be for those only that prosecuted without naming those who severed. And judgment was affirmed nisi, &c. Cro. C. 420, 421. pl. 11. Mich. 11 Car. B. R. Price v. Parkhurst.

3. A judgment is recovered against 4 defendants. A writ of error is brought, and one of the 4 defendants is summoned and severed, and he releases errors, the judgment is reversed quoad the 3, and a nil capiat per breve entered for the 4th. 2 L. P. R. 538. cites Mich. 9 W.

For more of Summons and Summons and Severance in general, see Attachment, Jointenants, Non-suit, and other proper titles.

Summons of the Pipe.

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same S. P. But
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their green wax is
Silo. issued by a
different of-
ficer, and

the casual revenue is annexed to such summons of the green wax. Gt. Hist. View of the Exche. 138.

3. Summons of the pipe issued against defendant to levy 500 l. upon a super set upon him by one Jones, treasurer of certain sums of money in the late times. And a supersedeas was now moved for, because this is an execution against body and goods, and otherwise the party cannot be received to plead in discharge of it. And per Hale Ch. Baron, summons of the pipe ought not to issue but for a debt upon record, or a debt stated and determined, and not for money due upon matter in pais, as this case is: wherefore if a col-

lector in chief charge his under-collector upon account, or an under-collector charge any particular person within his precinct; or if any accountant charge another together with himself, for timber, or other goods of the king's sold to him, and not paid for, summons of the pipe shall not issue in these cases, but a scire facias, or a distringas ad computandum, to which the party may plead; for that these debts are not debts upon record, but arise upon the accountant's charge only; and so here: wherefore in this case the summons of the pipe was superseded, and a scire facias ad computandum awarded. Hard. 322. pl. 1. Pasch. 15 Car. 2. in Scac. Anthony Mildmay's case,

For more of Summons of the Pipe in general, see other proper titles.

Sunday.

(A) *What Things done on a Sunday, are void, or not.*

1. **D**IE Dominico nemo mercaturam facito: id quod si quis *lidis multator.*

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E. 485. pl. 1.

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quer, Bedoe v. Alpe.

6 Mod. 95.
S. C. ac-
cordingly.

4. One was taken on a Sunday, by virtue of an *escape warrant*; and it was held good; for one may take another on a Sunday upon fresh pursuit; and this is in the nature of it, though it be by a new method; for this *is no original process*, but the party is in still upon the old commitment continued down. 2 Salk. 626, pl. 7. Hili. 2 Ann. B. R. Parker v. Sir William Moor,

(B) *Service of Process, Rules, &c. In what Cases good on Sunday.*

1. 29 Car. 2. **E**NACTS, that no person upon the Lord's day shall cap. 7. s. 6. serve or execute any writ, process, warrant, order, judgment, or decree, (except in cases of treason, felony, or breach of the peace,) but the service of every such writ, &c. shall be void; and the persons executing the same shall be as liable to answer damages, as if they had done the same without any warrant.

2. In trespass and battery, upon not guilty pleaded, a special verdict was given, viz. the plaintiff being complained of to a justice of peace, he makes a warrant to the defendant to take the plaintiff, and to find sureties for the good behaviour, the defendant, being constable, executes the warrant upon a Sunday. Whether this was good within the late statute which says that all process executed upon a Sunday other than for the peace shall be void? Resolved for the defendant, that a warrant for the good behaviour is a warrant for the peace and more; and this statute is to be favourably extended for the peace. This judgment was affirmed in a writ of error in B. R. Trin. 32 Car. 2. Raym. 250. Hill. 30 & 31 Car. 2. C. B. Johnson v. Colton.

3. *Delivery of a declaration upon a Sunday is not good.* Ruled per Holloway J. Comb. 21. Trin. 2 Jac. 2. B. R. Anon. *Declaration was delivered on Trinity*

Sunday, and debated on motion, if such delivery were not void by the statute of 29 Car. 2. 7. And per Holt, strongly it is; for first, it is an act of necessity within the meaning of the statute, as putting of ecclesiastical process upon the church door, or making a tender to save a penalty. And he said he would take the word process for proceeding, and such construction as tends to a better observation is to be made; and this declaration, as delivered for that by the statute, but in the Sunday, but in the Waldegrave's case default, and a writ because the statute delivery was but of the defendant had and said, that that 13 W. 3. Walg

1, till Trin term; need always on the Mich. 13 W. 3. or a judgment by try was not good; tra, because such o the Court that not intermeddle, 705, 706. Mich.

4. *Penire J. Cro. J. 64. I*

5. If an officer refuses to obey week-day, and into contempt

Mich. 9 W. 3. Br Anon.

le.

To have an attachment for non-payment of an award, there must be personal

service, which if it be on a Sunday, though it is not good to have an attachment for non-payment on that day, yet it is for refusal on any other. Comb. 462. Mich. 9 W. 3. J. R. Anon.

*[63]

6. The question was, whether serving an attachment for contempt on Sunday were within the statute against sabbath-breaking, the words being that all arrests on Sunday, except for breach of peace, are void. Holt Ch. J. said, suppose it were a warrant to

take for forgery, perjury, &c. shall they not be served on Sunday? and shall not any process at the king's suit be served on Sunday? sure the *Lord's-day ought not to be a sanctuary for malefactors?* and this here partakes of the nature of process upon an indictment; but Cur. advises vult. 12 Mod. 348. Pasch. 12 W. 12. 10. 3. B. R. Sir . . . Cecil and others of the town of Nottingham.

Comb. 462. 7. *Service of a declaration in ejectment upon a Sunday* was held good per Cur. and not within the statute 29 Car. 2. cap. 7. 3. B. R. Comb. 286. Trin. 6 W. & M. B. R. Anon.

— But Hill. 13 W. 3. It was held per Cur. that *service of a declaration in ejectment on Sunday* is not good now upon the statute of 29 Car. 2. For it is a *process*, though not a judicial one; for it is *compulsive* on the party to appear. And it may as well be said, that *service of a summons in a real action* may be good on Sunday. 12 Mod. 667. Tailor's case.

1 Salk. 78. 8. A man was *arrested* on a Sunday by a writ out of the Marshalsea. The Court refused to discharge him, but directed to bring an action of *false imprisonment*. 5 Mod. 95. Trin. 7 W. 3. Wilton v. Guttery.

Carth. 504. 9. A woman was libelled against for living incontinently with the lord, &c. and was thereupon excommunicated. The suggestion for a prohibition, and likewise for an absolution, was, that she was wrongfully excommunicated, the citation being served on her on a Sunday contrary to the statute 29 Car. 2. by which it is enacted, *that no process whatsoever shall be served on a Sunday, except in cases of treason, felony, or breach of the peace*. And though it was pretended this citation was fixed on the church door on a Sunday, and that it is the constant usage both before and since the statute so to do, it was said, that this might be well enough where the person cannot be personally cited; but where he can, it is not the constant practice which will give authority to such a citation, redressed; but the statute to rectify, but that the temporal process on a Sunday as on a non. Car. 2. cap. 7. and the bailiff is to do this will be 18.

Carth. 504. S. C. by name of Alanfon v. Brookbank, and that a prohibition was denied. — 2 Salk. 625. pl. 4. S. C. accordingly. — 12 Mod. 275. S. C. accordingly. — S. C. cited Arg. l.d. Raym. Rep. 706. in case of Walgrave v. Tailor.

(C) In what Cases it shall be *Dies Juridicus*.

But where 1. If an *original* should bear date on a Sunday, the appearance of the party would not help it. Arg. Vent. 7. Hill. 20 & 21 Car. 2. B. R. in case of Vaughan v. Loyd.

— And a writ of inquiry was returned. the Court refused to intermeddle, and said, that the appearance had made all good; and the judgment stood. Ld. Raym. Rep. 705, 706. Mich. 13 W. 3. Walgrave v. Tailor.

* S. d. 406. pl. 10. S. C. but S. P. does not appear.

2. Serjeant

1. Serjeant Hawkins says, it hath been holden, that in every caption of an indictment taken in a sheriff's torn or court-leet, the day whereon it was taken ought to be set forth, that it may appear not to have been on a Sunday. 2 Hawk. Pl. C. 56. l. 9. cites the cases in the margin. 2 Saund. 290, 291. 2 Keb. 738. — 1 Vent. 107.

3. Case against the custos brevium, the declaration was delivered on Friday morning, and rules given to plead within 4 days, whereas Saturday and Sunday were not juridical days. Et per Cur', we reckon them non juridici as to matters to be transacted in court, and therefore Sundays and holidays are no days to * move in arrest of judgment. But as to business done out of court, rules to plead within 4 days, &c. Sundays are reckoned the same with other days. Salk. 624. pl. 2. Trin. 11 W. 3. B. R. Asmole v. Serjeant Goodwin. The 4 days to plead must always be reckoned such days wherein the defendants may plead and when the offices are open; and therefore

Sunday is never reckoned one of those days, because neither courts or offices are then open. And this is so like the case mentioned on the other side, where Sunday is reckoned one of the 14 days for giving writ of error, because a man may prepare for his journey, or come up to London on that day as well as on any other day of the week; and for this reason it was resolved, that the plea should be received. 3 Mod 21. Mich. 7 Geo. 1721. The Ld. Copingsby's case.

* Sunday is not included in the 4 days to move in arrest of judgment, but the defendant must have 4 juridical days. 2 Salk. 625. pl. 6. Trin. 2 Ann. B. R. Sir Christopher Hales v. Owen.

4. It was moved to stay the proceedings, the writ being returnable in 8 days from St. Hillary, and the notice being to appear on Sunday Jan. 29. Per Cur. the Sunday is the true day of the return, and therefore it is as it ought to be. Notes in C. B. 205. Hill. 7 Geo. 2. Jenner v. Oatridge. Upon hearing counsel on both sides, and after taking time to consider, the

Court were of opinion, that a notice to appear on Monday Jan. 21. as the return-day of Off. Hill. was bad, it ought to have been to appear on the 20th, which, although it be Sunday, is the true day of the return. Notes in C. B. 207. East. 7 Geo. 2. Lloyd v. Beeston.

5. The writ was returnable quinden' Pasche, served with notice to appear on Ap proceedings; but the return. pro- of loyd

6. A mot Sunday, and Monday after defendant did notice of a c ed, which it he came before serving of the plaintiff would proceed upon such irregular service of the process; and therefore proceedings were staid. Rep. of Pract. in C. B. 205, 206. Trin. 7 & 8 Geo. 2. Janet v. Veyen on a Notes in C. B. 209. S. C. the de- after 12th rice r till then

(D) Statutes.

1. 1 Cor. 1. ENACTS, that there shall be no meetings, or concourse of people, out of their own parishes, on the Lord's-day, for any sports and pastimes, nor any bear-baiting, bull-baiting,

[65]

baiting, interludes, common plays, or other unlawful exercises, used by any within their own parishes; and every person offending shall forfeit 3s. 4d. to the use of the poor of the parish. And if any justice of peace, or the chief officers of any city, borough, or town corporate, upon their view, or confession of the party, or proof of one witness by oath, shall find any person offending in the premises, the said justice or chief officer shall give warrant to the constables and church-wardens of the parish, to levy the penalty by distress and sale of goods; and in default of distress, that the party offending be set in the stocks 3 hours; and if any man be sued for execution of this law, he may plead the general issue, provided that no man be impeached by this act, except he be called in question within one month after the offence; provided also that the ecclesiastical jurisdiction by this act shall not be abridged.

Continued indefinitely by 3 Car. 1. cap. 4. and 16 Car. 1. cap. 4.

2. 29 Car. 2. cap. 7. s. 1. enacts, that all the laws in force concerning the observation of the Lord's-day, and repairing to church thereon, shall be put in execution; and all persons shall on every Lord's-day apply themselves to the observation of the same, by exercising themselves in piety and true religion publicly and privately; and no person shall do any worldly labour or work of their ordinary callings upon the Lord's-day (works of necessity and charity excepted); and every person of the age of 14 years, or upwards, offending in the premises, shall forfeit 5s. And no person shall publicly cry, or expose to sale, any goods upon the Lord's-day, upon pain to forfeit the same goods.

S. 2. No drover, horse-courser, waggoner, butcher, or higler, shall travel or come into their inn or lodging upon the Lord's-day, upon pain to forfeit 20s. And no person shall travel upon the Lord's-day with any boat, wherry, lighter, or barge, except upon extraordinary occasion, to be allowed by some justice of peace, or head-officer, upon pain to forfeit 5s. And if any person offending in the premises shall be convicted before any justice of peace, or chief officer, upon view or confession of the

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meat in families, or dressing or selling of meat in inns, cooks-shops, or victualling-houses, for such as otherwise cannot be provided, nor to the crying of milk before 9 in the morning, or after 4 in the afternoon.

S. 4. No person shall be prosecuted for any offence before mentioned, unless he be prosecuted within 10 days after the offence.

3. 11 & 12 W. 3 cap. 21. s. 3. enacts, that it shall be lawful for the rulers, &c. of the company of watermen, to appoint any number of watermen, not exceeding 40, to work on every Lord's-day between Vaux-hall above London-bridge, and Limehouse below bridge, at convenient place, for carrying passengers cross the river, at 1d. each, &c.

4. 9 Ann.

4. 9 Ann. cap. 23. s. 20. enacts, that coachmen or chairmen licensed, may ply on the Lord's-day, notwithstanding the act 29 Car. 2. cap. 7.

For more of Sunday in general, see *Escapes*, *Robbery*, and other proper titles.

Superfedeas.

[66]

(A) Superfedeas. *What Thing will be a Superfedeas. Writ of Error.* [* *Audita Querela*, pl. 6.] • See (H).

[1. *WHERE* the party cannot be restored to all that which shall be lost by the execution (if it be made) when the judgment is reversed, there the writ of error shall be a superfedeas of the execution (at what time soever it be brought as it seems is intended); because otherwise it will be mischievous. 7 H. 6. 29.]

[2. *As if a juror be attainted in a writ of attain, a writ of error shall be a superfedeas, because he cannot be restored to that which he shall lose, if the execution be made.* 7 H. 6. 29.]

[3. *The same law is in writ of error upon an attainder of felony.* 7 H. 6. 29.]

[4. *But if
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7 H. 6. 42. —
of Br. Superfedeas
no such point at (44.)

Where a
man brings
writ of error
of a judgment given
against him,
he ought to
sue superfedeas of execution:
quod mirum!
a statute, and
recent, and
r, p. 60. cites
all the editions
and that there is

[5. *But it seems it is a superfedeas in law to the defendant; so that he ought not to deliver the statute to the plaintiff, as he there did, and thereupon the plaintiff sued execution; and there it is held that it is not any superfedeas in law of the delivery without an actual superfedeas.]*

that it seems that after the writ of error is sued and allowed, execution cannot be awarded of the first judgment

Fol. 490.

Br. Error,
pl. 60. cites
S. C. but
Brooke adds,
judgment

Judgment; for by the writ of error the record itself is removed, and then the Court has nothing whereof to award execution.

Br. Superfedeas, pl. 18. cites S. [6. An *audita querela* upon a statute shall be a superfedeas in law of the execution upon it. 24. E. 3. Audita Querela, 11.]

C.—If a man sues forth an *audita querela*, to avoid a statute staple or a statute merchant, he shall have a superfedeas to the sheriff, not to do execution hanging the plea, &c. F. N. B. 240. (A) cites Reg. 173.

Audita querela is no superfedeas, and therefore execution may be taken out, unless a superfedeas be found for it; and if the *audita querela* be founded on a deed, it must be proved in court before a superfedeas shall be granted. 1 Salk. 92. pl. 1. Mich. 3 W. & M. B. R. Langston v. Grant. — It is no superfedeas till there be a special superfedeas, which shall not be granted till the matter be proved by a witness. 12 Mod. 105. Anon. — Comb. 389. Mich. 8 W. 3. B. R. Langston v. Grant, that when the deed is produced in court, and proved or confessed, a special superfedeas may issue, but not to stop the sheriff from selling; per Holt Ch. J. But the goods were stayed by consent.

[67] 7. When one is in execution, they cannot supersede it by error, but he must continue committed, else there would be no remedy to bring him into custody, in case the judgment should be affirmed; but on an *audita querela* the party is discharged by bail, because this is a new suit; and the party is never to be taken again, 2 Keb. 43. pl. 88. Pasch. 18 Car. 2. B. R. The King v. Whitmore.

for det.—Stealing and breaking of parks. — So where persons were seized to the king at the sessions, and in execution for it, and brought habeas corpus and a writ of error, the Court would not bail them, because they are in execution for the king; but it was said that it is usual in the Crown Office to bail in such case. Sid. 320. pl. 10. Hill. 18 & 19 Car. 2. B. R. The King v. Marcell, &c. Inhabitants of Lyme-house.

(B) By Error. In what Cases it shall be a Superfedeas in Law. By what Thing. [Not where it is as a new Original.]

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ginal. 10 H. 6. 6. b.]

[3. But if *seire facias* be sued to have execution of a judgment in annuity, a writ of error of the judgment in the annuity shall be a superfedeas of the *seire facias*; for it always depends upon the first original. 10 H. 6. 6. b.]

[4. If a man brings debt for damages recovered by judgment, if after the record of the judgment be removed by writ of error, yet this is not any superfedeas to the action of debt; for it is a new original. 10 H. 6. 6.]

S. P. Er.
Error, pl.
170. cites
13 E. 4. 4.
— But
where error

recovers debt and damages, &c. and writ of error is thereupon brought, then the defendant or plaintiff cannot

that not for execution by original, nor otherwise of the damages, nor of the land; because by the writ of error the record is gone, and the hands of the justices closed. Br. Execution, pl. 68. cites 4 H. 6. 31.— Br. Detr. pl. 106. cites S. C.

But in action upon the case, the plaintiff was nonsuited at the verdict; by which the defendant, by the statute 23 H. 8. had judgment to recover his costs; and after the record was removed by error into B. R. by the plaintiff, pending which the defendant brought action of debt in C. B. upon a new original, and counted upon the record of the action upon the case, and this matter was pleaded by the defendant, &c. and the best opinion of the Court was, that the action is maintainable, inasmuch as it is brought upon a new original. D. 32. pl. 5. Pasch. 28 & 29 H. 8. Anon.

Defendant brought a writ of error in the Exchequer-chamber, of a judgment given against him in B. R. And then plaintiff brought an action of debt upon that judgment; to which defendant pleaded *nil tibi record*. Resolved, that the plea is naught; for debt lies notwithstanding, and cited D. 32. b. pl. 5, 6. & 13 E. 4. 7. But Bendl. 10. pl. 31. takes this difference, that when the action of debt is brought before the writ of error, the action continues good. But if the writ of error is brought first, then debt does not lie. But that in case of *LIMBURY v. LANGHAM*, the Judges held it was all one, and that writ of error is no superfedeas to an action of debt; and that notwithstanding the writ of error, the bail may being in the principal in discharge of the mainpernors. Raym. 100. Hill. 16 & 17 Car. 2. B. R. *Adams v. Tomlinson*.— Lev. 153. S. C. and says, that all except Keeling held, that it well lies; for the record itself is still in this court, and the writ of error is a superfedeas only of the execution.— Sid. 236. S. C. accordingly.— Mod. 121. pl. 23. Pasch. 26 Car. 2. *Draper v. Bridwell*: all the Court held, that an action of debt would lie upon a judgment after a writ of error brought.— 3 Keb. 330. pl. 25. S. C.—S. C. cited Lutw. 602. & S. P. resolved accordingly, (the Ch. J. being absent,) Mich. 11 W. in case of *Denton v. Evans*. For (as Powel, J. said) this action has been allowed ever since the reign of H. 6. And sometimes this plea has been pleaded in abatement, and sometimes in retardatione, &c. of the suit; but could not be made good, because there can be no certain time for re-summous of the party, when the judgment should be affirmed, as there is in the case of a protection.

So debt upon a judgment in B. R. the defendant pleaded, in abatement of the action, a writ of error pending upon this judgment in Com. Scacc. To which the plaintiff demurred; and it was adjudged for the plaintiff, being argued by Serjeant Levinz for the plaintiff, & Sid. 236. 4 H. 6. 31. & 18 E. 4. 6. were cited by him to be so resolved. And a case was cited by Dolben to be adjudged accordingly in the time of Roll, and after affirmed in parliament before all the judges in England, between *LIMBURY* and And though it had been stuck at, and Vaughan questioned it, yet it had been oftentimes so ruled. And it was held in the case of *DANVERS* and *SUTTON* in the Exchequer-chamber, that such plea is not good in bar, but good in abatement; but this difference was not thought reasonable. And Holt Ch. J. said, if it was not for the current of authorities contra, it seemed hard to him that such an action lies; for the writ of error is a superfedeas to an execution, and therefore, *pari ratione*, it ought to be a superfedeas to all the ways to come at an execution; and he cited the case of *REAN* and *BRAN-BLOCK*, where a man pays a security of an inferior nature, pending a writ of error upon a judgment on a security of an higher nature, this was not a devastavit, which shews that the writ of error had so totally suspended the effect of the judgment, that it shall not have any regard or essence; but this notwithstanding, it was, Skin. 388 Mich. 5 S. C. accordingly.—

In debt in C. B. up Guildhall where the record was removed into B. R. by the plaintiff, it was; because the record and the superfedeas is But the Ch. J. held, court, but ought to delete the writ of error; as 3 Lev. 396. Pasch. Mich. 9 W. 3. in the whole matter, judg Mich. 5 W. & M. in S. C. but D. P.—Skin. 400. S. C. but D. P.—4 Mod. 214 S. C. but D. P.

The Court doubted if debt would lie upon a judgment pending a writ of error. Holt Ch. J. said, Vaughan was of a different opinion from Hale in this matter. But the law seems now fixed, that a writ of error stays all proceedings whatsoever. 12 Mod. 75. pl. 17. Pasch. 5 Ann. B. R. Anon.

the issue was tried at the issue was founded, was (as made) was, when it was argued, that it was not execution upon it, but a judgment in this case, & 18 E. 4. 6. b. that in Trin. or next, that in Trin. or next, declaring upon the writ of error, 7.—3. Lev. 375. P.—Carth. 281.

* [68]

[5. If a *scire facias* be sued to have execution of a fine, and tenant comes and pleads, and after brings writ of error of the fine; yet this shall not be any superfedeas to the *scire facias*; for it is in a manner a new original. 10 H. 6. 6.]

So it is so, that to execute a fine, the tenant brought a writ of error.

[6. But

ror; and it was argued if it should be allowed, because execution was awarded; and at last it was allowed, for by the writ of error their hands are closed; so that if they proceed it will serve for nothing, wherefore they allowed it. Br. Error, pl. 10. cites 20 H. 6. 4.

[6. But otherwise it is, if he brings the writ of error before the return of the scire facias. 20 H. 6. 4. b.]

[7. If a man be adjudged to account, and after the plaintiff brings a *capias ad computandum*, in which the parties are at issue, and it is found against the defendant; and after the defendant brings writ of error, admitting that it lies, yet it shall not be any superfedeas; so that the judges shall not give judgment according to the verdict. 21 H. 6. 26.]

S. P. but is founded upon the first grant of the annuity. Br. Error, pl. 200. cites 4 H. 6. 31.

8. Where a man grants an annuity for 20 l. and for non-payment at the day 10 l. *nomine pæne*; there if writ of annuity be brought of the annuity, and the plaintiff recovers, and the defendant brings writ of error, there the first plaintiff, upon shewing of the deed, may have writ of debt for the pain in C. B. And it is no plea, that there is writ of error pending of the principal annuity; for this action is not brought of any thing which was adjudged by the first record. Br. Execution, pl. 68. cites 4 H. 6. 31.

* [69] 2 Lev. 38. S. C. by the name of HOPKINS and PRIOR v. WRIGHTS-WORTH, says the error assigned in the Exchequer-chamber was the death of one of the plaintiffs; and the defendant in error there, pleaded in nullo est erratum, which is not lie in B. R. chamber.

9. Writ of error in the Exchequer-chamber of a judgment in B. R. and error in fact was assigned there, and they affirmed the judgment: whereupon record of affirmation was remitted into B. R. and another writ of error in B. R. *coram vobis residen* (as is usual for error in fact); it was moved, that upon putting in bail, this new writ of error might be a superfedeas to the execution: but the Court held, that this writ was not to be allowed in this case; because the judgment being affirmed in the Exchequer-chamber transit in rem judicatam, and a writ of error cannot be brought here on a judgment there; and it is the course, in a writ of error, to recite all the proceedings that have been in the matter. And the course is, that if a writ of error be brought here, upon error allowed in court; case. Vent. 207.

the new writ of error does endings in the Exchequer-

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an

brings error in the the mesne profits, sustain, in case the judgment be affirmed; pending which the plaintiff in the original action brings trespass against the defendant for the mesne profits. It was moved, that the plaintiff has no title to this action, pending the writ of error; for by this means the defendant may be doubly charged; and should the plaintiff get judgment in trespass before the writ of error be determined, we have no remedy, (in case the judgment be reversed,) for the damages recovered against us in trespass. But it was answered by 3 Judges, (Holt absent,) that this writ of error in the Exchequer-chamber is no superfedeas of the judgment, as it would be in this court upon a judgment in C. B.

PER V. LENTHALL, 4 Mod. 247. Lutw. 600. 2dly, It was resolved, that the record does remain in the Queen's Bench, notwithstanding the writ of error in Cam. Scacc. Supposing the writ of error does not prevent the action, it has been reasonably argued, that they should have a record before them to proceed upon; but yet it has been held, that the record is not before them. The words of the 27 Eliz. cap. 8. are only directory: it enacts, that in the cases mentioned in the act, a special writ of error shall be devised in the court of Chancery, directed to the Ch. Just. of B. R. commanding him to cause the said record, and all things concerning the judgment, to be brought before the justices of C. B. and barons of the Exchequer, into the Exchequer-chamber, there to be examined by the said justices of B. R. and barons of the Exchequer, &c. It has been always thought sufficient, if the transcript of the record were only removed; that is a removal of the record quoad their consideration. All the entries are transcript' record' & process', &c. cum omnibus ea tangent' pre-textu cujusdem brevis dominæ reginæ de error' corrigend', &c. in premissis prosecut' justic' dictæ dominæ reginæ de C. B. & baron' de Scaccar' dominæ reginæ in Cam. Scacc' juxta formam statuti, &c. a Cur. dictæ dominæ reginæ hic coram ipsa regina transmiss' fuerunt, &c. except 1 And. 143, 144. where record' & process' are transmitted into Cam' Scacc. but all other precedents are to the contrary. It was resolved, that the action was well brought, and that the defendant should answer over; per tot. Cur. Parker Ch. J. Powell, Powis, and Eyre. Pasch. 10 Ann: Regina, B. R. Godwin v. Goodwin.

1 Saund.
180. Lawe
v. King.

Plaintiff re-
covered
judgment;
defendant
brought a
writ of er-
ror, and
pending that
writ, plain-
tiff brought

13. In action of *debt upon a judgment*, defendant *moved to stay the proceedings pending a writ of error*, which the Court ordered upon giving judgment in this action. A rule of court of B. R. was produced, whereby proceedings were staid, without giving judgment pending the writ of error; but per Cur. the practice is otherwise. Barnes's Notes in C. B. 170. Trin. 7 & 8 Geo. 2. Sedgley v. Westbrook.

an action of *debt on the judgment*, and after judgment therein, *levied execution*. And the question was, whether plaintiff could do this without leave of the Court? Per Cur. defendant might have moved the Court to stay proceedings in the action on the judgment, pending the writ of error, which is always granted; but *having made no such application, plaintiff is regular*. Barnes's Notes in C. B. 137. East. 9 Geo. 2. Humphreys v. Daniel.—Rep. of Pract. in C. B. 129: S. C. accordingly.

[71]

See (A) (B)

(C) Superfedeas. By Error or Attaint.

[1.] If a man *recovers debt against executors*, a writ of error shall be a superfedeas of the execution. 17 E. 3. 46.]

[2. If a man *recovers against J. S. in a writ of trespass, by which it is awarded quod defendens, capiatur*; and after the defendant brings writ of error, yet it shall not be any superfedeas of the *capias pro fine* for the king. 16 Ed. 3. Attaint, 24. by Hill.]

If a man be
condemned in
debt or tref-
pass by false
verdict, and a

[3. So if the defendant brings an *attaint*, yet this shall not be any superfedeas of the *capias pro fine* for the king. 16 E. 3. Attaint, 24. by Hill.]

and a *capias* be awarded to arrest the party, now if the party sues an *attaint*, he may come into the Chancery,

Chancery, and there find sureties that he shall appear at the day, &c. and answer the party, and satisfy the king and the party what belongs to them, if the attainr does pass against him; and upon the same he may have a superfedeas to the sheriff, that he do not arrest him. F. N. B. 237. (F).

If a man be condemned in trespass and the defendant brings attainr, and the plaintiff sues execution by *eign*, and *capias* is awarded against the defendant for the king's fine; the defendant in Chancery may sue a superfedeas of the *capias*, reciting in the writ, that the defendant has brought an attainr, and that the plaintiff has sued forth an *elegit*, commanding the sheriff to whom the superfedeas is directed, that if the defendant do yield himself to prison, and there find sureties to the sheriff to satisfy the king for what belongs to him, &c. that then he do deliver him out of prison upon that security, if he conceives the same to be sufficient security. F. N. B. 238. (c).

[4. If A. recovers against B. debt or damage, and after sues a *capias ad satisfaciendum* against B. which is returned *non est inventus*, and upon this a *scire facias* is awarded against the bail and returned, and after a 2d *scire facias* is awarded, but a day before the return thereof, B. brings writ of error upon the first judgment. This is not any superfedeas to the proceedings against the bail, but the 2d *scire facias* may be returned, and thereupon the plaintiff may proceed against the bail, notwithstanding the writ of error; for it is distinct from the principal judgment. Mich. 13 Car. B. R. between LOCK v. TILLIARD, by Jones and Croke against the opinion of Brampton.]

[5. If a man recovers against J. S. and upon a *scire facias* has judgment against the bail, and after the bail brings writ of error upon the judgment given in the *scire facias*. This shall not be any superfedeas in law of the execution upon the first judgment against the principal. H. 11 Ja. B. R. adjudged.]

[6. If A. recovers against B. in B. R. where C. and D. are special bail for B. and after B. brings writ of error against A. upon this judgment in the Exchequer-chamber, and after C. and D. the bail, to discharge themselves of their bail, bring into the court of B. R. the body of B. and pray that his appearance be entered, and that A. shall take him in execution. Yet though the roll for the bail is a several roll from the roll where the judgment is brought against A. yet if the bail do not accept this writ of error is a superfedeas to the execution against B. in execution into the Exchequer-chamber. 4 CODROR and between CALF v. Curiam.]

Fol. 491.

† S. C. cited Arg. Lat. 149. in the case of Calf v. Bingley. — S. C. cited Poph. 186. in S. C. by the name of Calf v. Nevil & al. † Jo. 138. pl. 4. S. C. — Poph. 185. S. C. — 3 Bulst. 331. Calf v. Bingley. S. C. — See Bail v. Curiam.

[7. If a man bring writ of error upon a judgment in B. R. and remove the record in 10 days after, execution shall be granted, because it appears that the writ of error is brought merely for delay. P. 13 Ja. B. R. between MARSH and WHETSTONE, adjudged per Curiam.]

Where damages are recovered and the defendant is imprisonable, there he shall find surety in writ of error, or remain in prison if he do not.

Pr Execution, p. 3 c. 1. 7. 14

4. 40. — the year be not past, or if he be not in prison by way of execution. Br. Error, pl. 38. cites 7 H. 4. 36. [40.]

Br. Surety,
pl. 3. cites
S. C.

S. P. But
Brook says,
mirum!
that their
hands are
not closed
by the com-
ing of the
writ of er-
ror, which

9. In trespass the plaintiff recovered, and writ of error came, and it expired, no record being removed, and after came another writ of error, by which execution was awarded for the delay; but it was said, that when the record is removed into B. R. the defendant may come here and have superfedeas to the sheriff to surcease from execution. Br. Superfedeas, pl. 17. cites 9 [it should be 19] H. 6. 8.

is directed to them. Br. Executions, pl. 51. cites 19 H. 6. 7, 8. — The very sealing a writ of error is a superfedeas to the execution; per Keeling. And Twifden said, that in a writ of error to remove the record of a judgment, some of the parties names were left out, and that by advice of Wild J. the writ not removing the record, they took out execution. But that the Court was of opinion, that though the record was not removed thereby (of which, they said, he was not judge whether it was or not), yet that it so bound up the cause that they could not take out execution. It is indeed good cause to quash the writ of error, when it comes up, but execution cannot be taken out. Mod. 38. pl. 73. Mich. 21 Car. 2. in B. R. Hughes v. Underwood.

The difference of the books is, that when the first writ abates by act of the party, the second writ shall be no superfedeas, but otherwise when it abates by the act of God, or without the act of the party, as for want of form. Per Jones J. and judgment accordingly. Lat. 57, 58. Pasch. 1 Car. Crouch v. Hains.

10. Where the defendant is awarded to account, and pleads to issue before auditors, and this is certified to the justices, and found against him by nisi prius, and upon this a writ of error is cast, yet the Court shall award him to the Fleet, for he is as a prisoner by reason that he had found mainprise before to appear in proper person every day pending the plea; for writ of error cannot stay execution, by reason that there was a judgment given before, viz. the award to account, and all times after he shall be adjudged in ward; and if a man be in ward, he cannot be taken out of ward by writ of error. Br. Error, pl. 77. cites 21 H. 6. 66.

11. If error is sued, there if it be error apparent in the record, the justices shall let the party to mainprise; but if it be error in ty to prison; per

and an attaint was
record was removed
t, the first plaintiff
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erfedeas, nor does
se of error. Sic
5 & 7 E. 6. Ayliff

A writ of
error, tho'
it removes
not the re-
cord itself
(in which
case it would
necessarily
be a super-
fedeas, the
foundation

v. Plat

of these proceeding below being taken from them) is upon very good reason in law a superfedeas; and in this respect differs from an attaint where a no superfedeas, for the verdict being founded upon the oaths duodenum legum. & credendum omnium. the law will admit of no presumption against the truth of such verdict, did it but call for aside by verdict in attaint, which is the reason the bringing such attaint only, is in itself no superfedeas; so tender is the law of the reputation of the subject, as for no respect to perturb him person without manifest proof upon the oaths of a double jury, and so tender of his liberty and property, as not to admit the same to be taken from him, upon so slight a presumption as the only thing forming a writ of error is. See Skin. 422. Hill. 5 W. & M. in B. R. in the case of the certioraries in Cunnery.

13. 3 Jac.

13. 3 Jac. 1. cap. 8. enacts, That no execution shall be stayed by any writ of error or supersedeas thereupon in any action of debt upon a single bond, or upon any obligation with condition for payment of money only, or ^a for rent, or upon any contract in the courts of record at Westminster, or in the counties palatine, or in the courts of great session; unless such person, in whose name such writ of error is brought, with two sureties, such as the Court, wherein the judgment is given, shall allow of, shall first be bound unto the party for whom judgment is given, by recognizance in double the sum recovered, to prosecute the writ of error with effect, and also to pay (if the judgment be affirmed) all debts, damages, and costs, adjudged upon the former judgment, and all costs and damages to be awarded for delay of execution.

This act was made perpetual by 16 and 17 Car. 2. cap. 8.

the justices; the term being adjourned propter pestilentiam in London, and the adjournment did not extend unto them: now a new writ of error, *quod coram vobis refidet*, was brought; and forasmuch as this writ was brought after this statute to stay execution in debt, it was prayed that according to the said statute he might have execution, or that the parties should put in sureties to pay the condemnation: but upon consideration of the statute, all the justices held, that it was out of the statute, because it is not an original writ of error, but it is in lieu of a former writ upon which the record was removed before the statute; and it being discontinued not through default of the party, it is not reason he should be prejudiced thereby; wherefore it was resolved, that this case was out of the statute 3 Jac. cap. 8. Cro. J. 135. pl. 8. Mich. 4 Jac. B. R. Bostock v. Sneli.

Judgment in debt upon an *infimus compusasset*, the defendant brought a writ of error in B. R. and the plaintiff in the action moved, that he might put in bail, according to this statute. But per Cur. this case is out of the statute, because the debt recovered did not arise upon any contract, or other duty certain at the first, but merely upon an account between the parties, which has reduced divers uncertain farms to a certainty. So that the original cause of action being founded upon the account, which is uncertain, it is therefore out of the statute. Yelv. 227. Hill. 10 Jac. B. R. *Girling v. . . .* 2 Bulst. 53, 54. S. C. by the name of *Gilling v. Baker*; and the whole Court agreed, that this case is out of the statute, and the writ of error was allowed without finding sureties; and the counsel affirmed it to have been so adjudged before. — S. C. cited and agreed Lev. 117. Pasch. 15 Car. 2. B. R. in case of the Dean and Chapter of Paul's v. Capell.

Debt upon arbitrament is not within the statute, because here is no certain debt at the first, nor till the arbitrators have reduced the controversies to be recommended by a certain sum. Yelv. 237. Hill. 10 Jac. B. R. in Girling's case. — S. P. 2 Bulst. 54. in case of Gilling v. Baker, S. C. — S. P. agreed Patch. 15 Car. 2. 8. R. in case of the Dean and Chapter of Paul's v. Capel.

But in debt upon a bond conditioned to pay to B. so much money as J. S. upon account by him stated between the plaintiff and defendant, should declare to be due to the plaintiff, the defendant pleaded, that J. S. had not declared the plaintiff. Upon error by the plaintiff, which error was agreed, that this action is the bond was executed, the original action to take his case. 187. Pasch. 15 Car. 2.

Debt upon bond for pa
2 Bulst. 54. Mich. 10

But where *debt* was brought and damages for the and *over* being brought

and error being brought should put in bail accordingly was objected, that the words of 3 Jac. which authorize money. And to this Twissel. intended; but per Keble and Norton, this action, upon what the error is brought, was for money only recovered by the first judgment, and judgment is within the words (contracts for money), and for that the plaintiff is error to put in bail. 1 Lev. 260 Hill. 20 and 21 Car. 2. B. R. Biddolph v. Temple.

Ex parte pleaded plene administravit, which was found against him. He brought a writ of error; and it was moved that he should not have a superseas to stay execution without special sureties to pay the condemnation if judgment be affirmed. Resolved that this case is out of his statute, which, though the words are general, yet must be intended where the action is brought against the party himself upon his obligation, or in case where the judgment is general against the executor, but where the judgment is special, that execution shall be de bonis testatoris, and de bonis or de bonis propriis it is not reasonable that he should find sureties to pay the whole condemnation with his own goods; and ac-

See (C. 2)
—Error was brought in the Exchequer Chamber of a judgment in this court in debt for rent, which (and all other writs of error depending there) were discontinued by the not coming of

ire out of the statue.

It is signed, and *ver-*
ified, and *certified*,
by the *author* of the
"History of the U. S." It
is a *very* good copy of the
original, and is a *very* good
copy of the original.

Lev. 26c Hill. 25

According to this difference, Coke Ch. J. said it had been ruled in C. B. when he was there; and Man the secondary said, that the precedents of this Court ever since the statutes were, that a superfedeas shall be allowed upon error brought by an executor or administrator. Cro. J. 350. pl. 2. Mich. 12 Jac. B. R. Goldsmith v. Platt.—2 Bulst. 284. S. C. accordingly. And Coke Ch. J. said, that if in this case sureties should be found, this would then change the judgment of the law, which in this case here is conditionally, (with a si habuerit,) and if he should here find sureties, that will then make the judgment to be absolute; and the whole Court agreed with him.—S. P. resolved and ruled accordingly in debt upon a bond against an administrator. And Wright, clerk of the errors, said it was the common practice upon this statute. Cro. C. 59. pl. 3. Hill. 2 Car. C. B. Sir Henry Mildmay's case.

* But in scire facias against administrator defendant upon *devastavit* alleged, and judgment *de bonis propriis*, error was brought, and it was agreed per tot. Cor. that he shall find bail; for being charged *de bonis propriis*, it is not like the case where administrator is charged *de bonis testatoris*; but here it is in *jure proprio*, and not like MILDMAI'S CASE, nor to GOLDSMITH AND PLATT'S CASE [above]. Lev. 245. Trin. 20 Car. 1. B. R. Fitzwilliams v. More.—Sid. 368. pl. 4. S. C. accordingly.

Judgment was given in debt upon an obligation for payment of money, and debt upon this judgment, and another judgment thereupon; and in error of the last judgment it was doubted if bail shall be found. Cited Lev. 268. in case of Biddolph v. Temple, 22 Mich. 29 Car. 2. Taylor v. Baker.

Bond for payment of money upon the return of a ship on a bottomree contract is out of the letter of the act of 3 Jac. cap. 8. so that no bail is needful. Show. 14, 15. Pasch. 1 W & M. Garret v. Dandy.—S. C. cited Comyns's Rep. 322. Arg. Mich. 6 Geo. 1. in the case of Huddy v. Gifford, and agreed to as reasonable by the counsel of the other side.

Where a bond was to pay money, and to do other collateral acts, though in an action on the bond, the breach assigned was only for not paying the money, and so the case upon the pleading is the same as if the condition of the bond had been for payment of money only; yet per Holt Ch. J. this case is not within the statute which relates to judgments upon bonds, with a condition for payment of money only; and in this a judgment being given, a writ of error was allowed without bail. Carth. 29. Pasch. 1 W. & M. B. R. Gerard v. Danby.

A. was bound with J. S. the defendant, for the debt of J. S. to pay 50 l. to W. R. 30th October next, and at the same time J. S. gave bond to A. reciting the joint bond to W. R. and says, if therefore the said J. S. pay to the said W. R. the said 50 l. on the said 30th October, &c. then, &c. The 50 l. not being paid at the day, A. brought debt against J. S. and had judgment. J. S. brought error, but he not finding bail, A. took out execution. It was insisted that this bond was only as an indemnification-bond, and so not within the statute. But it was urged on the other side, that this was a bond for payment of money, and consequently within the statute. King Ch. Just. seemed to think this case within the letter of 3 Jac. cap. 8. and that this statute ought to have a liberal construction; but because the judges of B. R. doubted, and inclined to the contrary opinion, that there might be one uniform opinion in the two courts, it was agreed to be put off till the Court could talk with the judges of B. R. And in the last day but one of the term, the Ch. Just. delivered the opinion of the Court, and said, that this court was agreed that execution ought not to be stayed in this case, if bail was not found; for the statute ought to be construed liberally, and for the benefit of him who had obtained judgment; and therefore the rule for staying execution was discharged. Comyns's Rep. 321, 322, 323. pl. 164. Mich. 6 Geo. 1. Huddy & Uxor v. Yate Gifford.—In this case was cited the case of HAMMOND v. WILKIN, as determined in B. R. 1 Geo. where the condition recited a former bond given by the defendant to A. and then goes on, viz. (if the said J. S. shall pay the said sum of, &c. on the said day, &c. then, &c.) in the same words as in the present case; and says, that the Court was of opinion, that bail was not necessary, be-
counsel of the other side,
case of Hammond v. Wel
Debt was brought in C
whereof the parties bound
On error brought in B. R.
unless B. had put bail
tion is brought on a single
given, which imports the
tract, yet it is not for pay
so not within the provision
be given upon a writ of error
obtained in such action; as for instance, if an action be brought
in B. R. for 5 l. the bail is not required, but if judgment be had in that action, and a writ of error
brought, bail shall certainly be given. 3 Mod. 121. 22 Pasch. 9 Geo. 1724. Strode v. Christy.

on S. S. articles, at the end
and plaintiff had judgment.
perfedes to the execution,
requires, that where an ac-
bat in such case bail shall be
And though this is a com-
niance of an agreement, and
the original action, yet it must

If a man be
taken in ex-
ecution, he
cannot be
bailed tho'
he brings a
writ of er-
ror. Vent.

14. The record of a judgment in B. was removed by error into the Exchequer-chamber and it was prayed, that the defendant, bring in execution, might be bailed; but because the record was removed, so as there was no record here, it was held, that he could not be bailed here; neither could he in the Exchequer-chamber, because they have no authority, but only to reverse or affirm the judgment, and

and not to make execution, and so he is not bailable. Cro. J. 108. Hill. 3 Jac. B. R. Sheppard v. Allen.

2. Mich. 30
Car. 2. B. R.
Anon.

15. Judgment was given in B. R. in Ireland, and a writ of error on that judgment, returnable in B. R. in England. All the justices of B. R. were of opinion, that the writ of error in judgment of law is a superfedeas, though the record itself is not sent, but the transcript only. For it is the same where error is brought in parliament of a judgment in B. R. here. And so also of error in the Exchequer-chamber, the transcript only is sent, and yet the Court is fore-closed pendente placito indiscusso. And they all resolved, that the writ of error was a superfedeas until the error was examined, affirmed, or reversed. Cro. J. 534, 535. pl. 19. Pasch. 17 Jac. B. R. The Bishop of Ossory's Case.

16. If a writ of error is brought in this court, and the day of the return is long, in order to delay the party, as if it be more than the next term, the Court may award execution. Het. 17. Pasch. 3 Car. C. B. Anon.

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The Court
agreed 6 H.
7. 15. that
a writ of
error with
an over-long

return is no superfedeas; nor can such writ, being under seal, be mended here; but in Chancery, by motion, it may. 1 Keb. 109. pl. 1. Mich. 1661. 13 Car. 2. in B. R. Anon.—S. P. Sid. 45. pl. 2. Mich. 13 Car. 2. B. R. Anon.

17. 13 Car. 2. Stat. 2. cap. 2. §. 9. enacts, That no execution shall be stayed in the courts mentioned in the act 3 Jac. 1. cap. 8. by writ of error or superfedeas thereupon after verdict and judgment thereupon, in any action of debt upon the statute 2 Edw. 6. cap. 13. for not setting forth of tithes, nor in any action on the case, upon promise for payment of money, trover, action of covenant, detinue and trespass, unless such recognizance as by the former act is directed, be first acknowledged.

18. 16 & 17 Car. 2. cap. 8. §. 3. enacts, That no execution shall be stayed in any of the aforesaid courts, by writ of error or superfedeas thereupon, after verdict and judgment thereupon, in any action personal whatsoever, unless a recognizance with condition, according to the statute 3 Jac. 1. cap. 8. §. 9. be first acknowledged. error
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§. 5. Provided that this act shall not extend to any writ of error brought by any executor or administrator nor unto any action of debt, nor unto any other action upon any penal law (except for not setting forth of tithes), nor to any indictment, presentment, information, or appeal.

19. Error was brought in the Exchequer-chamber, to reverse a judgment in B. R. The writ of error was signed by the Ch. J. but before the record-certified he died, and no new writ of error was brought. Upon a motion for leave to take out execution, the Court (upon inquiry of the practice) said, that if the record be

In some
cases a
such a mo-
tion, the
Court or
near the
defendant

to shew
cause.
Barnes's
Notes in
C. B. 136.
Hill. 9 Geo.
2. Cram-
borne v.
Quennel.

not certified within eight days, they in the office of the clerk of the papers, would give rules to take execution, but they may certify the record, and so make all good, because the writ was signed; but if it had not been signed, it had abated by the death of the Ch. J. Sid. 268, 269. pl. 20. Trin. 17 Car. 2. B. R. Allen v. Shaw.

The book says, There were several other motions of the same kind this term; and it was held by the Court, that where the writ of error is not returned by the Ch. J. it becomes inefficual; but plaintiff cannot take out execution without leave of the Court. — S. C. And where in such case the plaintiff took out execution without leave of the Court, it was held to be irregular. Barnes's Notes in C. B. 137. Hill. 9 Geo. 2. Hayes v. Thorton.

It was held upon hearing counsel on both sides, that the writ of error not being returned and signed by the Ch. J. becomes inefficual by his death; and the rule to shew cause why plaintiff should not have leave to take out execution, was made absolute. Barnes's Notes in C. B. 136. Hill. 9 Geo. 2. Otterthaw v. Stanforth. — Rep. of Pract. in C. B. 128. S. C. and cites Middleton and Gardner the like rule.

• The case
of the Earl
of Pembroke
v. Bostock.
Mod. 112.
pl. 9. Anon.
seems to be
S. C. of
Ayers v.
Lenthall.

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20. Twicken J. said, that Trin. 5 Car. 1. * Godb. 439. it was settled on solemn argument, that the writ of error was the superfedeas in itself, and there is no inconvenience, and if it be delivered, shewed, or allowed before the return thereof, it is a sufficient superfedeas; but if the return be before the day in Bank, or of the judgment, per Cur. it is no superfedeas. And by Hale Ch. J. errors, nor other records, are not returned till a term after taken out, and sometimes longer; therefore it is no reason to stay so long; to which Rainsford and Wild agreed; and Wild said he knew it ruled, that allowance of error after execution taken out, and before executed, was a superfedeas. 3 Keb. 309. pl. 51. Pasch. 26 Car. 2. B. R. in case of Ayres v. Lenthall.

Where in
such an ac-
tion the de-
fendant
pleaded such
a plea in
abatement,
upon de-
murrer it
was adjudg'd
that the writ
should abate.

Carth. 1 Trin. 3 Jac. 2.
in this case, and refers to
contrary, [which see also
B. R. Rot. 500. where
pending, neither in cases
compelled to make any law
defendant was ruled to answer over.]

21. The plaintiff brought an action of debt on a judgment obtained in B. R. and the defendant pleaded in bar, that he ante diem impetrationis bille predicti, had brought a writ of error on that judgment, which was still depending; and upon a demurrer to this plea, it was adjudged, that this matter could not be pleaded in bar, though it might be pleaded in abatement; and thereupon the plaintiff had judgment. Carth. 1. Trin. 3 Jac. 2. in B. R. Rogers v. Mayhew

he reporter makes a quibble
here it was adjudged to the
Rowley, Trin. 7 W. 3.
pleaded a writ of error de-
petit, &c. if he should be
was adjudged ill, and the

Show. 146.
S. C. ac-
cordingly
per tot Cu.
and that the
law was al-
ways taken
to be so till
one case in
Sir Fran.
Pemberton's
time, when a

22. Debt upon escape was brought against the marshal, in which the plaintiff had a verdict and judgment; and in an action of debt brought upon that judgment, the defendant pleaded that he brought a writ of error on the same, adhuc dependen. &c. indiscuss. and concluded in abatement, (viz.) si respondere compelli debeat, &c. And upon a general demurrer to this plea, it was adjudged ill; so the defendant was ruled to answer over. Carth. 136. Pasch. 2 W. & M. B. R. Rottenhoffer v. Lenthall.

difference was made between in bar and abatement; but the Court now held it all one, and judgment.

judgment for the plaintiff. And the book says, that the defendant afterwards pleaded the same plea in bar, and the plaintiff had judgment.——S. C. cited, and S. P. adjudged accordingly. Show. 98. Trin. 2 W. & M. between Syme and Tyme.

23. In a *real action*, after judgment the plaintiff may enter, notwithstanding writ of error, if his entry were lawful, without the judgment; for that is not by force of the judgment, which shall not put him in a worse condition than he was in before. 12 Mod. 398. Pasch. 12 W. 3. in case of Badger v. Floyd.

24. Upon a writ of error brought after judgment, *execution ought not to be stayed, if bail be not found.* Comyns's Rep. 321. pl. 164. Mich. 6 Geo. 1. Huddy & Uxor v. Yate Gifford.

25. Plaintiff in error put in bail, but the plaintiff in the original action excepted against them as insufficient, and nothing further was done to justify them, or to put in other bail. It was insisted, that this putting in insufficient bail will not conclude the party, and compared it to the case of REEVE v. PIKE, where, after defendant put in bail, he moved that they might be discharged; but it was denied. And in the principal case judgment was given, that this writ of error was no superfedeas, unless good bail was put in. 8 Mod. 121, 122. Pasch. 9 Geo. 1. 1724. Strode v. Christy.

26. An action of trespass for the mean profits was brought pending a writ of error on an ejectment; defendant moved to stay proceedings. The Court said, this case was within the reason of the rule which is constantly granted where an action of debt is brought on a judgment pending a writ of error; and therefore made a rule that the plaintiff might proceed to ascertain his damages, and to sign his judgment, but that execution thereon should be staid till the writ of error on the judgment was determined. Rep. of Pract. in C. B. 46. Trin. 2 Geo. 2. Harris v. Allen.

27. The plaintiff did not sign his judgment till after the return of the writ of error, the Court, on hearing counsel on both sides, and the matter fully debated, and many cases cited, declared that the plaintiff might sign his judgment, and if he thought fit to do so, he had liberty to proceed to execution, notwithstanding the writ of error, if he signed his judgment before the return of the writ of error; therefore the Court made a rule accordingly. Rep. of Pract. in C. B. 46.

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28. But on a writ of error brought after a judgment signed, the plaintiff had confessed a judgment, and promised to sign it the 31st of May, which was the day before the return day of this term, but he deferred doing it till after the return of the writ of error was expired, and then took out his execution, which the Court said would have been regular, if he had not consented to sign judgment at the time above-mentioned, but seeing he had acted this part contrary to his own agreement, they ordered the execution to be set aside, and restitution made; and likewise ordered the plaintiff's attorney to pay out a new writ of error at his own costs.

was executed after the writ of error was returned, and the plaintiff signed his judgment after the return of the writ of error was expired, though called upon for that purpose, the Court ordered the execution to be set aside, and restitution made, and the plaintiff's attorney to pay out a new writ of error at his own costs.

dered a new writ of error to be sued out, at the plaintiff's expence, and that he should pay the defendant his costs. Rep. of Pract. in C. B. 77. East. 5 Geo. 2. Duffield v. Warden.

But the reporter cites the case of Harding v. Avery, [supra, pl. 27.] and says quære; for it does not appear in this case that the plaintiff has in any manner misbehaved himself. Rep. of Pract. in C. B. 71.

S. P. But it was insisted that if the plaintiff had staid till Michaelmas term following before he had signed final judgment, as in the case of JOY AND FRANKLIN, he might have had some colour to

29. On a motion to set aside an execution taken out upon a judgment signed in Trinity vacation after the expiration of the writ of error, which was returnable tres Trin. the Court were of opinion, that the plaintiff could not regularly sign his judgment, and take out execution thereon till Michaelmas term following, because every judgment is of the first day of the term; so the judgment having relation to the first day of the term, must be construed to be signed pending the writ of error, which was returnable tres Trin. and consequently the writ of error attached upon the judgment and was a *superfedeas*, and execution afterwards was irregular; which therefore the Court set aside, and ordered the plaintiff's attorney to pay costs. Rep. of Pract. in C. B. 77. Mich. 6 Geo. 2. Warwick v. Figg.

take out execution (though that is a practice not to be encouraged); and the Court were of that opinion, and ordered the execution to be set aside, and restitution and costs; and an attachment nisi against the plaintiff's attorney, to stand over till he sees restitution made, and costs paid. Barnes's Notes in C. B. 127, 128. Mich. 6 Geo. 2. Warwick v. Figg.

30. Joint action against several defendants; damages 20l. against 4 of them on trial, and 5s. against one defendant, who had let judgment go by default. Writ of error was brought by the 4, in the name of the one who was not obliged to find bail, because it was by default. It was moved for leave to take out execution against the 4, notwithstanding such writ of error. Cur. shew cause; rule made absolute Trinity next, on affidavit of service. Barnes's Notes in C. B. 138, 139. East. 9 Geo. 2. Mason v. Simmonds and others.

Barnes's
Notes in
C. B. 309.
S. C. ac-
cordingly.

31. Judgment for the plaintiff; a cap' ad facis' issues thereon against the defendant; upon that cap' ad facis' an exigent was taken out, tested 7. sued by the defendant, tested 5. moved, that the plaintiff notwithstanding the writ of error, might p. judgment, and then a writ of error of error. It will permit the plaintiff to take out execution, though they

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aff in i. stay execution. But it was answered, that the writ of error was a *superfedeas*. It is true, it is no contempt till notice; but, taking out the writ of error, the Court is stayed from proceeding to execution. And of that opinion was the Court, for the exigent was only to carry on the execution. Comyns's Rep. 307. Mich. 10 Geo. 2. Spinks v. Bird.

Mich. 10
Geo. 2.
case re-
charging

32. Defendant being brought to the bar by the warden of the Prison, by virtue of a *habeas corpus ad satisfaciendum*, in order to be charged with the writ of error at the plaintiff's suit, produced the allowance of a writ of error, and objected that such writ was sealed and allowed.

lowed, he ought not to be charged. But the Court said, they would not intermeddle; plaintiff might proceed at his peril; and thereupon defendant was charged in execution. Barnes's Notes in C. B. 267. Trin. 10 Geo. 2. Hannot v. Farettes.

in execution
was after the
sealing and
allowing the
writ, but
before notice

thereof to plaintiff's attorney, the Court set aside the commitment in execution, but refused to grant an attachment against plaintiff's attorney, because though the writ of error be a supersedeas from the allowance, no contempt is incurred till after notice of it.—Rep. of Pract in C. B. 133. S. C. accordingly.

(C. 2) Error in Parliament. In what Cases it shall be a Superfedeas.

1. **C.** Had judgment in the C. B. in ejectment; and H. brought a writ of error in B. R. and the judgment was affirmed. And afterwards he brings error in the parliament; and the Ch. J. in B. R. brought the record itself in parliament, and there left a transcript of it, and brought back the record itself. And after the parliament is dissolved, and C. now prays execution, and had it; although the writ of error abated without the act of the party. And Noy said, it is doubted if error in parliament shall be a superseas; for upon that, if the party be in execution, he shall not be bailed, as he should be in another court; and cited 1 H. 7. 19. b. 15 H. 6. 18. By dissolution of parliament, the error is abated. 22 E. 3. 3. 1 H. 7. 19. And so was the case of GODSAVE and HEYDON, error in parliament abated by dissolution. And by Doderidge error was brought in parliament, and the party prays a scire fac. returnable the next parliament, and it was denied, for the delay. And in our case execution was awarded. Noy, 76. Crouch v. Hanney.

Lat. 57.
Pafch. 1
Car. Crouch
v. Hain,
S. C. ac-
cordingly,
and fays the
parliament
was dif-
folved by
death of
king James.
—Jo. 66,
pl. 2. S. C.
accordingly,
though it
was infifted
that this
abatement
was not by
the act of
the party,
but of God.
And the

And the Court said they would not stay execution, in expectation that he would bring a new writ of error the next parliament; and though execution be made, yet he may bring a new writ of error, and be restored to all that he lost, if the judgment was erroneous.—2 Roll. Rep. 352, 353. Trin. 21 Jac. S. C. but not S. P.—Godb. 407. pl. 448. S. C. but not S. P.

2. A writ of
given in C. B.
by the prerogative
brought, teste the
19 November, h
rogued. The

was not discontinued, by any act of the parties, for the full length of time on which this writ was returned, and that there be no supersederes. Motion denied. P. H. 120. *Black v. Holt* v. Holt:

Is a long protraction, to read a term's interest is not safe for A. to be a judge of error upon judgment C. B. where a record is actually returned into, in a case where there be a protraction, and no continuance of the term of error, execution shall be made. *Ad. v. Deane* W. & A. in B. R. James v. Barkley.

it in dower, discontinued writ was
was
d of Crim

Sid. 413.
pl. 11. S. C.
adjournatur.
—See
2 Keb. 438.
pl. 39. 491.
41. and
pl. 87.

[illegible]

erred upon
ation, and ne
A' in R. R.

79

7. It was moved to discharge the bill by yeas 454, nays 27. S. C. 27.

Court doubted if they did quash the 1st writ, whether the 2d writ, being without day, would be a superfedeas.

for not delivering wine affirmed in B. R. which the Court granted. But had it been returnable *in presenti parlamento*, or *on a day certain*, it would have been a good superfedeas; but being amended since delivery to the clerk of the errors, the parties thereto were committed; but would not quash the writ of error, nor allow any new one; and they agreed that a return in *presenti parlamento without day, unless sedente parlamento*, if adjourned for half a year, or any long time, is no superfedeas. 2 Keb. 647. pl. 83. Pasch. 22 Car. 2. B. R. Roderiguez Francia v. Waldow.

4. If a writ of error be brought in the Exchequer-chamber, and that be discontinued, and another writ is brought in parliament, this second writ is a superfedeas. Vent. 100. Mich. 22 Car. 2. B. R. Anon.

Mod. 285.
pl. 31. Trin.
29 Car. 2.
B. R. Sir
FRAN.

5. But if a writ of error be brought in parliament, and that abates, and the plaintiff brings a second, this is no superfedeas, because it is in the same court. Vent. 100. Mich. 22 Car. 2. B. R. Anon.

DUNCOMB'S

case, S. P. and were it not for the difference of the year seems to be S. C.

* Vent. 31.
Wortley v.
Holt.

6. It was moved that the clerk of the court might make out process, notwithstanding a writ of error, of conviction of perjury brought in parliament, returnable *ad prox. sessionem*, being after another writ of error determined by prorogation, and so no superfedeas, as * WORTHLY'S case; but the Court refused to meddle in it, but left the party to use discretion. 2 Keb. 749. pl. 2. Pasch. 23 Car. 2. B. R. the King v. Robinson.

Mod. 106.
pl. 15. S. C.

7. Error was brought in parliament, and this determined by prorogation, and a 2d writ of error was brought, and this also determined by prorogation in November to 7 January following, and then a 3d writ of error was sued, and a superfedeas prayed to stay execution; and after several debates and search of precedents it was granted, the prorogation being *to a day certain, and no term interposing*. But per Hale, if a term had interposed between the teste and the return of the writ of error, no superfedeas should issue, unless there be *error apparent* in the record, notwithstanding that the writs of error are abated by the prorogation, without default of the party. And Wild J. held, that though a term had interposed between the teste and return of the first writ of error, yet a superfedeas should be granted in this case, because the determination of the writ is by the prorogation, without default of the party. 3 Lev. 93. Mich. 25 Car. 2. B. R. Goston v. Sedgewick.

8. Execution was prayed on a writ of error brought in parliament, and discontinued by prorogation, which Wild and Raynsford granted, the record being never carried hence, nor transcribed. 3 Keb. 238. pl. 55. Mich. 25 Car. 2. B. R. Istead v. Streater.

† 2 Lev. 93
at the end
of the case

9. A rule was lately made by the House of Lords, that all causes there depending should not be discontinued by the intervening of a prorogation.

prorogation. Vent. 266. Hill. 26 & 27 Car. 2. Lord Eure v. of Goston
Turton. v. Sedgwick, the same rule is mentioned to have been made.

10. Some time after the above rule, a writ of *error*; tested 30th November, was brought returnable in parliament 13th April following, that being the day to which the parliament was prorogued. It was insisted that this case will not be there depending before the return of the writ. Hale Ch. J. said, that *the rule does not reach this case, because the writ is not returned.* And the opinion of the Court was, that the writ of error * was no *superfedeas*; but they would make no rule in it, because they said the cause was not judicially before them, but the party might take out execution, if he thought fit; and then if the other side moved for a *superfedeas*, they should then resolve the point. Vent. 266. Hill. 26 & 27 Car. 2. B. R. Lord Eure v. Turton.

2 Lev. 120. S. C. by the name of Lord EURE v. TAYLOR and LEVINS, who was of counsel for the plaintiff, says, the Court said they might take execution at their peril, if by law they might do it; moved for a * [80]

for that executions are issuable of course without rule of Court; but if the other side had *superfedeas*, they said perhaps they should have denied to grant it.

11. Debt on a bond in C. B. and judgment for the plaintiff; *error* was brought in B. R. and bail put in according to the statute, and judgment affirmed; thereupon *error* was brought in parliament, and the clerk of the errors refused to allow the writ, unless the party would give a new recognizance. It was moved that it ought to be allowed without, it being not requirable by the 3 Jac. 1. cap. 8. Sed per Cur. the first recognizance does not include payment of costs to be assessed in the House of Lords, and those costs ought to be paid; and therefore a *new recognizance* ought to be given within the intent of the statute; and it is not the business of this Court to examine whether bail was put in upon the first writ; for the want of bail does not hinder the process of the writ of error, but only makes it no *superfedeas*. Salk. 97. pl. 2. Hill. 1 Ann. B. R. Tilly v. Richardson.

7 Mod. 120. Anon. but seems to be S. C. And the whole Court inclined that it was not a *superfedeas* without bail; but upon the importunity of Broderick gave leave to speak to it again. Though on a writ of error in

B. R. bail shall be put in there, yet if afterwards *error* in parliament be brought, *new bail* must be put in B. R. 8 Mod. 79. Trin. 8 Geo. Colebrook v. Diggs.

12. Writ of that time it was and term inter-fedeas of execution was, the writ the record, in

and before a new one, as a *superfedeas* to carry up of by

virtue of that writ. And after all, here the Court left them to do what they could by law 12 Mod. 604. Mich. 13 W. 3. 1701. Peters v. Benning.

13. Error of judgment in the Exchequer-chamber, returnable the 1st day of parliament, viz. the present sessions, and now it was moved that plaintiff in error might transcribe the record within 8 days, otherwise that execution might be taken upon the judgment; and a rule was made to shew cause upon this matter, but now the rule was discharged; for by order of the lords in parliament,

13th July 1678, all persons upon writs of error in parliament, shall bring in their writs in 14 days after the 1st day of the session in which such writs shall be returnable, otherwise such writs shall not be received unless it be upon judgment given during the session, which shall be brought within 14 days after judgment given; and therefore such motion within 14 days after the beginning of the session is too hasty; for it is not reasonable that a plaintiff in an original cause should take execution within the time allowed by order of the lords to bring such writ into their house; but if the plaintiff in error should exceed the time allowed by the lords, in such case it would then seem reasonable that the plaintiff should be at liberty to take execution upon the first judgment; and thus it was said to be formerly determined in this Court, in the cause between WHITE and ROBERTS. Comyns's Rep. 420, 421. Hill 13 Geo. 1. in the Exchequer, Barnes v. Otway.

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See (C. 2)
(E. 2)

(D) Error. *At what Time it shall be a Superfedeas in Law.*

After judgment in an action of debt, on a former judgment, and

ca. fa. delivered to the sheriff, defendant moved to stay execution pending a writ of error brought to reverse the former judgment. Per Cur. the motion comes too late; it ought to be before judgment in the later action. And so rule to shew cause was discharged. Barnes's Notes in C. B. 140. Mich. 23 Geo. 2. Clarkson v. Phyllick.

[1. IF a *capias ad satisfaciendum* be awarded, and after a writ of error comes, this shall not be a superfedeas to the *capias*, for it is out of the court, and lawfully granted. 17 E. 3. 8. 20 H. 6. 4. b.]

[2. In *assise of darrein presentment*, if upon demurrer a writ be awarded to the bishop for the plaintiff, and a writ of inquiry of the damages, and after a writ of error is brought of the principal, this is not any superfedeas to the writ to inquire of the damages; but the sheriff may serve it notwithstanding, and return it. 17 E. 3. 34. b.]

[3. But when it is returned in Bank, the Court cannot give judgment and award execution upon them, because their power is bound by the writ of error. 17 E. 3. 34. b. 36.]

Mo. 850.
pl. 1156.
S. C. by
the name of
Don Diego
d'Acuna v.
Gifford,
and resolved
accordingly.

[4. If A. recovers against B. and after a *nihil returned* against the principal, he sues a *scire facias* against the bail upon their recognizance, and after B. the principal brings writ of error, this writ of error shall not be any superfedeas of the *scire facias* against the bail. P. 14. a. B R between the Spanish Ambassador and Gifford. by Cook and Houghton.]

Roll. Rep. 314. p. 50 Hill. 13 Jan. S. C. and S. P. — 3 Bulst. 182. S. C. & S. P. — After a writ of error brought, and before the return of it, B. the plaintiff in error, was brought to the bar by habeas corpus brought by his bail, when B. and also his bail, prayed that he might be committed in execution in their discharge. But Hobart Ch. J. held, That by bringing the writ of error the Court was disabled either to award execution, or to put him in execution. And this also was the cause that the bail could not be discharged; for the end of the bail is not only to bring the body, but that he come subject to the Court, according to the meaning of the bail, which cannot be in this case, because of the writ of error; for the entry in discharge of the bail must be, that the defendant redidit se to the Court to be in execution, if the plaintiff will; which cannot be so here. And quære, whether this has not

to disabled this defendant by his own act, that the bail is forfeited, (note, the bail have not disabled themselves,) though afterwards he proceeded not in his writ of error; and so execution may be taken here. But note, that afterwards this term, Bradshaw the defendant was brought again to the bar by another habeas corpus, and the plaintiff prayed him in execution; which was granted, because the day of the return of the writ of error was passed, and he had not caused the record to be removed, and therefore this Court was re-enabled to award execution. Hob. 116. pl. 142. Pasch. 14 Jac. Wickstead v. Bradshaw. — It was agreed, per Cur. and the Attorney-general, that the bail may render their principal pending a writ of error, though during that time the plaintiff cannot charge him in execution. 7 Mod. 77. Mich. 1 Anne, B. R. in the case of Goodwin v. Hilton — Ibid. 98. S. C. & S. P.

[5. If upon a *fieri facias* upon a judgment against B. the sheriff takes the goods of B. into his hands; but, before sale of them, B. delivers to the sheriff a *superfedeas* upon writ of error, B. shall have his goods again; for no property was altered by the seizure. *Goods were taken by fi. fa. and before sale, the record was removed by writ of error into the Ex-* M. 17 Ja. B. between Sare and Shelton. Per Curiam.]

chamber, and a *superfedeas* awarded; and the sheriff returned, on the *fi. fa.* that he had seized the goods, and that they remained in his hands for want of buyers; and also, that a *superfedeas* was awarded; thereupon the defendant moved to have restitution. But, per tot. Cur. though the record be removed, and a *superfedeas* awarded, yet since it came not to the sheriff before he began to make execution, as appears by his return, a *venditioni exponas* shall be awarded to perfect it; and though the plea roll be removed, yet it shall be awarded upon the return of the *fi. fa.* which remains filed in the office. Cro. Elis. 597. pl. 2. Hill. 40 Eliz. B. R. Charter v. Peter. — Cro. E. 602. Charter v. Peter is a D. P. — Mo. 542. pl. 718. Hill. 40 Eliz. seems to be S. C. accordingly, by Popham & Gawdy, absentibus Fenner & Clench, and that the execution is intire, and cannot be divided.

* If one recovers in debt, and has *fi. fa.* to the sheriff to levy the debt, and defendant brings error on the judgment, and has *superfedeas* to the sheriff, so much goods of defendant as the sheriff has in his hands by the *fi. fa.* before the *superfedeas* comes to him, shall remain to satisfy the recoveror, and *venditioni exponas* shall issue thereupon; but after the *superfedeas* comes to the sheriff, he cannot proceed further upon the *fi. fa.* Yelv. 6. Trin. 44 Eliz. B. R. Tocock v. Honeyman.

If before the writ of error the sheriff returns a *fieri facias*, & *non invenit emptores*, the execution is not to be undone. Per Hale Ch. J. Vent. 255. Hill. 25 & 26 Car. 2. B. R. Anon.

Though a writ of error be a *superfedeas* in itself, yet, after execution begun, it shall not hinder it; but the sheriff may go on, and on a *fieri facias* sell the goods; per Holt Ch. J. 12 Mod. 99. Trin. 3 W. 3. Anon.

* [82]

[6. If upon a *fieri facias* upon a judgment the sheriff returns *quod cepit bona & catalla* of the defendant, and *quod remanent in custodia pro defectu emptoris*, & *quod ante returnum hujus brevis breve de non molestando fuit directum quod de ulteriori executione superfederet*, the which writ he returned annexed to the *fieri facias*. And this writ de non molestando was awarded in Bank, by reason of a writ of error there brought by defendant; but the record was not yet removed. *writ of error as 15 Pasch. a. 99. f. 57. not a writ of error* *was crassius Ascensior* and a writ of vend. *Per Holt Ch. J.* MILTON v. ELDRIN

6 Mod. 293. Mich. 3 Ann. contra, and said, that after

1. though a Roll. 13r. 491. b. additioni exponas shall go.

Surmise.

[7. If a writ of error be brought returnable in the *Exch. quer. chamber*, and it is allowed by the clerk of the errors, and *superfedeas* granted, but the record is not marked by the clerk of the errors, as the use is, or + notice of it given to the attorney of the other side, it not being done because it was not known who was attorney, nor the number-roll of the record known, by which it might be marked, yet this is a *superfedeas* in law; so that if execution be awarded after

S. C. cited 3 Lev. 313. in case of Smith v. Cave. — S. C. cited 3 Keb. 305. Pasch. 26 Car. 2.

B.R. in
case of
Ayers v.
Lenthall.—
S. P. Sty.
159. Mich.
1649. Mer-
cer v. Rule.
—† S. P.
per Cur.
11 Mod.
272. pl. 17.
Addm.

to another county than that where the superfedeas was granted, and is there executed, this is erroneous, and a superfedeas shall be awarded *quia erronee emanavit*. But it is not any contempt by the attorney of the other side in suing out of the execution, he not having notice of the writ of error, nor the roll marked. Mich. 1649, between METHWOLD and BAWD, adjudged accordingly, and such superfedeas, *quia erronee emanavit*, granted.]

8. A man is taken upon *ca. sa.* upon condemnation, and brought to the bar by the sheriff, and prayed to be delivered from it, because there is writ of error of it come to the Treasury, as he should be if the writ of error had been brought before the award of the capias, and was not delivered but sent to the Fleet. But Prisot said, that when the record is come up here, the justices may send for him to the warden of the Fleet. Br. Executions, pl. 9. cites 34 H. 6. 18.

9. A man was outlawed in B. R. and brought writ of error out of Chancery to them the same term, and they were in doubt if the writ of error was good or not; for it was too general, &c. And upon long debate it was awarded, that the party shall have *superfedeas* for his goods, *quod capta securitate quod non elongabit bona sua*, that then the sheriff and escheator cessabunt seiscire bona sua, quod nota; and if the matter pass for the party outlawed, he shall retain his goods, and if against him, then the king shall have his goods. Br. Superfedeas, pl. 27. cites 4 E. 4. 43.

[83]

10. Judgment was given in B. R. but before execution a writ of error was brought in the Exchequer-chamber; but the plaintiff in error did not bring a *scire facias ad audiendum errores*; the defendant in error brought a *scire facias* in B. R. *quare executionem habere non debet*, and since only a transcript of the record was removed by the writ of error, and the record itself remained here, he prayed execution. But by 3 justices, absente the Ch. J. though this be true, yet B. R. cannot award execution till the matter is determined in the Exchequer-chamber, and then they send back the transcript, and B. R. awards execution upon the first judgment; so t

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86, 187. Trin. 19 Jac.

11. Judgment was given in the Exchequer-chamber, and the record was removed thither; the plaintiff took out execution, and the sheriff levied the money. The defendant moved for restitution. After the Court had taken time to advise, Roll Ch. J. said, the record being removed by writ of error in the Exchequer is not now before us, nor was at the time of the execution sued forth; and this being after verdict and judgment, the writ of error is no superfedeas; but ordered a *superfedeas quia erronee*, &c. to supersede the execution (it being ill awarded) and to take the money out of the sheriff's hands. Str. 414, 415. Hill. 1654. B. R. Wingfield v. Valence.

12. Nota

12. Nota; If the *roll* be *marked* for a writ of error *before execution* done, the sheriff shall be excused for doing it before a superfedeas delivered; but this is sufficient to supersede the execution; per Twisden & Curiam. 1 Keb. 12. pl. 27. Pasch. 13 Car. 2. B. R. Anon.

But, per Cur. the marking the roll, or paying fees for a writ of error, or

allowance by the Cb. J. unless it be *actually taken out*, is no superfedeas to execution; but being taken out, it is. But the sheriff is not in contempt if he have no notice of it, or superfedeas delivered to him. This was on a motion to set aside execution, which the Court granted, if the secondary reported it was unexecuted when the writ of error was taken out. Keb. 863. pl. 4. Pasch. 17 Car. 2. B. R. Abbot, administrator of Pickas, v. Leech.

Till the roll be marked, or the writ delivered unto the officer in court, a writ of error is no superfedeas, especially after the return of it. 3 Keb. 191. pl. 39. Trin. 25 Car. 2. B. R. Pascal v.

13. Error being brought and *shewed to the attorney* is no superfedeas, by Twisden, until it be shewed to the clerk of the errors, which is an allowance in court: and therefore *if execution be done before it be allowed by the judge, or shewed to the clerk of the errors*, it is well done, because the attorney otherwise would never have it allowed, but only shew it to the attorney of the other side. But if he shew it, and * *declare his intention to have it speedily allowed*, there execution is superseded in the mean time; but yet if bail be not put in according to the statute, the execution may be well done, which the Court agreed. 1 Keb. 33. pl. 89. Pasch. 13 Car. 2. B. R. . . . v. Noell.

Nota, per Cur. at common law, if a writ of error be brought, and shewed to the attorney of the other side, the party could not have taken execution, nor before, unless

a rule be entered for judgment on the *p'stea*; but if he that shews the writ of error does not get it allowed within 4 days after, the party may sue execution, so if in 4 days after the allowance no bail be put in; but if the parties agree to accept the allowance and bail together, the party cannot sue execution; and because he had done so, the Court awarded restitution. 2 Keb. 129. pl. 84. Mich. 18 Car. 2. B. R. Warcop v. Pallavicine.

* See pl. 23.

14. A superfedeas was prayed for suing out execution, notwithstanding *special bail put in* (as it ought) before my Lord Ch. J. in writ of error, which although it be but *de bene esse*, yet it is good, if no exception against them; and per Curiam, till over-ruled no execution ought to be made; the notice of bail put in is only to excuse the party of contempt, but not necessary, so the bail be put in. The Court awarded superfedeas * and restitution. 1 Keb. 690. pl. 2. Pasch. 16 Car. 2. B. R. The Dean of St. Paul's v. Capel.

Lev. 117. Pasch. 15 Car. 2. B. R. S. C. but not S. P. — Nota pro regula, though the bail were not put in within 4 days after the writ of

error brought, according to the rule of the Court, yet it is a superfedeas; but the defendant ought to pay all the costs and charges of the plaintiff's proceeding after the 4 days; per Twisden and Keeling, contra Windham, on a motion for superfedeas to an execution, being executed after bail put in; but only *de bene esse*, and notice of it to the plaintiff, which the Court granted. Keb. 926. pl. 31. Trin. 17 Car. 2. B. R. Rand v. Kingston.

* [84]

15. Judgment was entered for the plaintiff, and execution taken out, and a writ of error was brought, which was sealed about an hour before execution executed. Whereupon it was moved, that the sheriff might bring the money into the court, for that the writ of error was a superfedeas; for though the sheriff shall not be in contempt, if he makes execution after the writ, if no superfedeas be sued out, for that he had no notice; yet the writ of error immediately upon the sealing forecloses the Court, so that execution made after is to be undone; of which opinion was the Court,

2 Keb. 506. pl. 78. S. C. and Livesey said, that Berkley J. had served him so herebefore. — So where a fieri facias was sued out on Friday,

and

the warrant delivered that evening to the officer, a writ of error allowed on Saturday morning, and notice delivered at the plaintiff's attorney's house about a quarter after 11 that morning, and execution executed before the plaintiff's attorney could countermand it, viz. about one at Hammersmith. Per Cur' the allowance of the writ of error with the clerk of the errors, is a superfedeas, without notice of such allowance. And though it was insisted, that this execution being taken out before the allowance of the writ of error might be executed, notwithstanding such allowance the execution being awarded by the Court; yet it was declared to be the settled opinion of the Court, that the allowance of a writ of error is a superfedeas, even where the execution issues before, and is executed after the allowance thereof, without notice of it. Rep. of Pract. in C. B. 39. Mich. 1 Geo. 2. Miller v. Miller.

So where the defendant suffered judgment by default, and slaid till after execution was sent down into Dorsetshire, and then got a writ of error allowed, and served the agent with the allowance thereof, and though it was impossible to stop the execution in Dorsetshire, the writ having been sent down some time before, yet the Court set aside the execution, and ordered restitution, and would not give the plaintiff his costs. For the allowance of a writ of error is a superfedeas from the time of the allowance, though the sheriff executes the writ before notice thereof was given; and yet neither the plaintiff, nor his attorney, nor agent, nor the sheriff, were blameable for any misconduct. Rep. of Pract. in C. B. 35. East. 13 Geo. 1. Jennings v. West.

16. At common law the very writ of error, especially when entered on record, was a superfedeas of itself; therefore, unless bail be put in, or the defendant declares that he will not stay execution, no writ of error ought to be allowed until execution be awarded. And unless the party render himself in execution or agree, it shall not supercede; per Cur. The allowance of the writ of error without bail was denied. 3 Keb. 169. pl. 2. Trin. 25 Car. 2. B. R. Hammond v. Gaap.

17. A superfedeas was prayed after execution executed by seizure, and before the sale of the goods upon 2 Rolls, 49. f. 5. and 1 Roll. 894. there being a writ of error duly taken out before, but the clerk of the errors not then in town, it was not allowed. The Court inclined, that the sheriff could not sell after superfedeas; but held, that before allowance the Court can take no notice of any writ of error. But adjournatur till the sheriff's return of scire facias. 3 Keb. 169. pl. 4. Trin. 25 Car. 2. B. R. Mull v. Warren.

If the plaintiff does not shew his writ of error to the other party, or get it allowed by the clerk, by his endorsing recipe upon it within 4 days (which time the Court gives as a convenient time for putting in bail according to the statute), * it is no superfedeas; per Hale Ch. J. Vent. 255. Hil. 26 Car. 2. B. R. Anon.—S. P. Mod 112. pl. 9. Pasch. 26 Car. 2. B. R. Anon.

18. After execution made out, the defendant's attorney shewed a writ of error to the plaintiff's attorney, after which execution is done, and per Cur. it is well done, the writ of error not being allowed with the Chief J. within 4 days after making; but if it had been allowed, though the sheriff might be excused of the contempt, yet a superfedeas is grantable; but per Cur. keeping a writ of error in the pocket is of no value after the 4 days. The Court would not undo the execution. 3 Keb. 294. pl. 23. Pasch. 26 Car. 2. B. R. Brittain v. Haukinson.

* [85]

3 Keb. 308. pl. 51. Ayers v. Lenthall seems to be S. C. accordingly,

19. If writ of error bears teste before the judgment given, and the judgment is given before the return, it is good to remove the record, and whenever the judgment is entered, it hath relation to the day in Bank, viz. the first day in term; so that a writ of error returnable after, will remove the record whenever the judgment

is entered; per Hale Ch. J. Mod. 112. pl. 9. Pasch. 26 Car. 2. and says the case in question was

B. R. Anon.

that the plaintiff had judgment for security, after which the defendant came in and prayed leave to plead, and before the rule is out procured a writ of error, and shewed it to the plaintiff, after which the plaintiff entered a second judgment for want of a plea, and to which of these judgments the writ of error should be applied was the question; and per Cur. it is in the plaintiff's election to either, and so was applied to the last, and a superfedeas thereon granted.

A writ of error was brought returnable on the effoin-day of Hilary Term, the final judgment was signed of the same Term the 26th of January, and the plaintiff took out execution, apprehending the judgment not to be removed by the writ of error. It was moved to set aside the execution, for that the judgment relates to the effoin-day, and is a judgment from that day; and the Court will not make a fraction of the day, and consequently the record is removed by the writ of error. It was answered that the judgment must be given before the return of the writ of error, and if given upon the return-day of the writ of error, it is not removed by that writ. The Court held the record shall be removed, and set aside the execution with costs. Barnes's Notes in C. B. 131. East. 6 Geo. 2. White v. Morgan.

20. A second writ of error brought after nonsuit in a former is no superfedeas; per Cur. and leave was given upon motion to charge the defendant in execution. Comb. 19. Pasch. 2 Jac. 2. B. R. Anon.

21. The plaintiff had a verdict in ejectment at the assises in the long vacation; the defendant brought a writ of error, which was allowed, and bail put in 24th October. The plaintiff afterwards on 27th October having no notice of the writ of error entered judgment generally (which refers to the first day of the term), and took out execution teste the first day of the term, and had it executed before notice of the writ of error; but upon a motion the defendant had restitution; for by suing the writ of error and the allowance, and putting in bail, the hands of the Court are closed, and so the execution void, though the suing it was no contempt, no notice being given. And though the judgment by the general entry relates to the first day of the term, (viz.) to the 23d October, and the execution is of the same date, and both before the allowance of the writ of error, which was 24th October, yet the judgment being founded on the verdict given in the vacation, upon which, by the rules of the Court, judgment could not be entered till the *quarto die post*, (viz.) till the 27th October, at which time the judgment was signed, the

S. C. cited by Eyre J. 8 Mod. 148. in case of Belt v. Collins.

. Trin.

W. and M.

22. In default of defendant bring the judgment B. R. and has error in the execution.

judicatum executionis. Notwithstanding all this, the original action went on and judgment execution, and now a motion was made to set it aside, because it was sued out when there was a writ of error depending. The Court held that a writ of error could be no superfedeas to the execution, and that what the plaintiff did was well, and no contempt. Saik. 264. pl. 4. Mich. 8 W. 3. B. R. Hartop v. Holt.

it. The 5 Mod. 229. S. C. accordingly; for the defendant of the writ of error, and the writ of error is not entered upon the merits of the case; but here the writ is entered, and the writ of error is

brought up in the award of execution, so that the Exchequer-chamber has no authority after that have assigned the first judgment. Comb. 193. S. C. per Curiam. 12 Mod. 105. 12. accordingly; for the Exchequer-chamber, by the affirming the first judgment on the award was

executed their authority, and have no power to examine their own judgment. — S. C. Ld. Raym. Rep. 97. accordingly, and that it is privileged from any other writ of error after affirmance there, or otherwise the law would be infinite and without end. — And says, * that afterwards, Hill. 8 W. 3. B. R. it was held in the case of *BONIES, AND RAWLINS, AND MAN*, that error in the Exchequer-chamber upon judgment in *scire facias* against bail is not a superfedeas to the execution, because error does not lie there in such case.

* [86]

S. C. 6 Mod.

310. The point was that a capias on a judgment was returnable such a day, and non est invent' returned, but not filed. A writ of error was taken out before the day of

23. A writ of error is a superfedeas *from the time of the allowance*, and that is notice of itself, but *if defendant has notice before allowance*, it is from the time of that notice a superfedeas; but if a *writ of execution be executed before a writ of error allowed or notice*, it may be returned afterwards. The utmost length of time the law allows for executing a writ, is the day whereon the writ is returnable; and it is not executable any longer that day than the Court sits; so long as it is *executable, but not executed*, the allowance of a writ of error is a superfedeas, but not afterwards. Salk. 321. pl. 8. Pasch. 3 Ann. B. R. Perkins v. Woolaston.

return of the capias, but not allowed till that very day, nor any notice thereof to the plaintiff's attorney, and the Court said, that the opinion in some books was, that a writ of error was a superfedeas to avoid execution from the enfealing thereof, though not to punish the officer till superfedeas comes to him; and of this opinion is Rolles. But that the law now is taken, that it is not a superfedeas till notice to the plaintiff's attorney, and that the allowance thereof is sufficient notice, or that actual notice be before allowance.

24. Error *coram vobis residen.* was brought on a judgment given in B. R. and the question was, whether it was a superfedeas before it was allowed by the Court. The Ch. J. and two other judges were of opinion, that it would be hard that the execution of a judgment in this court should be delayed by a writ of error *allowed by a secondary*; for if that should be so, then any man may avoid the execution for a whole vacation, at the expence of no more than 1s. There is certainly some *difference between a writ of error of a judgment coram nobis residen. and other writs of error*, for the one is directed to the justices of this court, and therefore should be allowed by the Court; but the other is directed to the Ch. Justice only. But Just. Eyre was of another opinion, he cited the case of *LOWNS and CARTER* in the Ch. J. Holt's time, where a writ *persedeas before it was allowed*. It is true that writs of error are brought in to reverse the record; but where a writ of error *coram vobis residen.* is brought, there is no record certified. Besides, there never yet was a motion in a court of law to allow a writ of error, because it is a writ of right, and due to the subject *ex debito justitiæ*. But admitting this writ is no superfedeas before the allowance, yet it is a good superfedeas after it is allowed, as this was by the secondary, and before notice; and so it was adjudged in the case of *SMITH v. CAVE*, in which case an execution executed was set aside, but the want of notice excused the contempt. 3 Mod. 147, 148. Trin. 9 Geo. 1724. Belt v. Collins.

25. A motion was made to set aside an execution issued after a writ of error allowed, and notice thereof given to the plaintiff's attorney; it appeared that an *interlocutory judgment* was signed, and a writ of inquiry executed in Michaelmas term last, and a writ of error was then allowed, and notice given; but the final judgment was not signed till after the beginning of Hilary term last. The Court held the execution to be regular, the interlocutory judgment not being removeable by the writ of error, and the final judgment being signed of a subsequent term, was not removed, and therefore refused to make any rule. Barnes's Notes in C. B. 130. East. 6 Geo. 3. Cooke v. Harrock.

Rep. of
Pract. in C.
B. 86. S. C.
And adds,
note, if the
writ of error
had been
returnable
after the first
return of the
term in
which judg-
ment was
signed, it
would have
removed the
day in Bank.

(D. 2) Error. In what Cafes it fhall be a Superfe- [87]
deas. To what Perfons. Privies or Strangers.

1. **JUDGMENT** was given erronee *that the king should seize the temporalities of the bishop of D.* and upon this the bishop brought writ of error, and pending this the king sued scire facias against R. of the provendery [prebend] of M. and supposes the provendery to be annexed to the temporalities, and that this voided after; and the other said, that writ of error is yet pending of this judgment; and yet because R. was a stranger to the first judgment, therefore the judgment not being reversed, the king recovered against him by award; quod nota, and so it seems that writ of error is no *superfedeas* but only to privies, and not to a stranger. Br. Error, pl. 62. cites 21 E. 3. 29.

(E) At what Time. Not *after a Supersedeas*. See (C. 2).

[1. **I**F a n
a ju
for judgmen
disallowed,
writ of error
for the first
void, and th
superseedeas in law. Mich. 15 Ja B. R. between SMITH and
Bowles adjudged.]

[2. If *A.* recovers against *B.* in an *affise en pais*, which judgment is after affirmed in *B. R.* upon a writ of error brought there, and upon the writ of error brought, a supersedeas of the execution is granted in *B. R.* and after *B.* brings a new writ of error in parliament; this writ of error shall be a supersedeas in law of the execution, for this writ is now brought in another court than where the first supersedeas was granted, and by the writ the hands of the judges of *B. R.* are closed. P. 12 J. B. R. between GONSOLL and

of error, be- **SHEPHERD** plaintiffs, and Sir Christopher **HEYDON** defendant, cause at an- adjudged.] other time

he has a *superfedeas* upon the first writ of error, whereby the plaintiff was delayed in the execution of his judgment in the assise, and therefore he ought not to be again delayed by a new writ of error, and cites 5 H. 7. 22. 6 H. 7. adly, This writ of error is to reverse a judgment upon a judgment, and the 1st judgment being affirmed by the 2d judgment is more than a single judgment, and it shall be intended true; wherefore the execution shall not be stayed, no more than in an *attaint*. All the justices except Coke Ch. J. held, that the writ of error itself is a *superfedeas* in itself; for although there were a *superfedeas* before, that was upon another judgment, and this writ of error is upon another judgment, and is in debate, whether it be error or no, and until it be determined, they may not proceed to execution; and they all held that a writ of error in parliament is by the dissolution of the parliament determined.——Mo. 834. pl. 1122. Heydon v. Shepherd & al. S. C. says, that Haughton and Croke J. and Coke Ch. J. held that the writ of error did not lie in parliament to reverse a judgment given in B. R. upon error brought there, because there is a double judgment, and that the reversal of the judgment given in the writ of error shall not reverse the first judgment, but that execution shall issue upon the first judgment in assise; but Doderidge contra.——Cro. J. 314. pl. 2. Heydon v. Godsalve is a D. P.——Godb. 250. pl. 347. S. C. by the name of Sir Christopher Heydon's case, and there Haughton, Doderidge, and Croke held clearly, that this writ of error was a *superfedeas* in itself, and that upon the book of 8 E. 2. Error, 88. and 1 H. 7. 19. which says, that the justices proceeded to execution after that judgment affirmed in parliament, and therefore ex consequente sequitur not before; and so the writ of error is a *superfedeas* that they cannot proceed, but there is no precedent of it in the Register but a *scire facias*, fol. 70. And the Court held, that if a *superfedeas* be once granted and determined in default of the party himself, he shall never have another *superfedeas*, but otherwise if it fail by not coming of the justices. Coke Ch. J. said, that admitting the writ of error be a *superfedeas* for the second judgment, yet it is a question, whether it be so for the first, which is not touched by the writ, and whether they may grant execution upon it or not, and cited 1 E. 4. 4. 43 E. 3. 3. 8 H. 7. 20. and therefore the Court advised Sir Christopher to petition the king for a new writ of error, and to do it in time convenient, otherwise they would award execution if they perceived the same merely for delay, according to the cases in 6 H. 7. & 8 H. 7. and the parliament being afterwards suddenly dissolved without any thing done therein, execution was awarded.——Roll. Rep. 18, 19. pl. 19. S. C. accordingly. And there Coke Ch. J. said, that if a man has judgment in writ of annuity, and then sues a *scire facias* and has judgment thereupon, and afterwards the defendant brings error upon the first judgment, this was a *superfedeas* for the first judgment, but not for the 2d, and so in the principal case.——2 Bulst. 159 to 176. S. C. accordingly.

* [88]

Br. *Superfedeas*, pl. 18. [3. If a man be nonsuited in an *audita querela*, he shall not have a *superfedeas* upon a new *audita querela*, because the first writ was a *superfedeas* in law. 24 E. 3. *Audita Querela*, 11.] cites S. C.

—He who is nonsuited in an *audita querela* after *superfedeas*, and brings another *audita querela*, he shall not have another *superfedeas*, per Jay. But Brooke says, it seems to be all one. Br. *Superfedeas*, pl. 23. cites 2 H. 7. 12.

Br. Execution, pl. 41. al
cites S. C.

—Br. Non-suit, pl. 56. al
cites S. C.

—If a man brings writ of error and has *superfedeas*, and af-

ter is non-

suit d. *erroris*

of error, and

then bring another writ of error he shall not have *superfedeas*; for he shall have only one *superfedeas*.

Br. *Superfedeas*, pl. 29. cites 5 E. 4. 2.——S. P. per Mordant. Ibid. pl. 23. cites 2 H. 7. 12.

——Br. Error, pl. 140. cites S. C. per Jay and Mordant.

In error, the plaintiff may be nonsuited and have another writ of error, but if the party be in execution, he shall not have *superfedeas*; per Cur. Br. Error, pl. 140. cites 2 H. 7. 12.——Br. *Superfedeas*, pl. 23. cites S. C.

But per Cur. if he be not in execution nor taken, he may have *superfedeas* in the second writ of error, though he had *superfedeas*, before in the first writ of error. Br. *Superfedeas*, pl. 23. cites 2 H. 7. 12.

——Br. Error, pl. 140. cites S. C.

——Br. Error, pl. 140. cites S. C.

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——Br. Error, pl. 140. cites S. C.

——Br. Error, pl. 140. cites S. C.

re *facias* upon it, and it of error and another re first action, who re- in the writ of error as- sed, and had it by 1st writ of error; and if error is *superfedeas*

in itself, and it is said that it is so where the writ of error abates, because the plaintiff is made bishop or knight, he shall have other *superfedeas*. Br. Error, pl. 55. cites 9 H. 5. 13.

then bring another writ of error he shall not have *superfedeas*; for he shall have only one *superfedeas*. Br. *Superfedeas*, pl. 29. cites 5 E. 4. 2.——S. P. per Mordant. Ibid. pl. 23. cites 2 H. 7. 12.

——Br. Error, pl. 140. cites S. C. per Jay and Mordant.

In error, the plaintiff may be nonsuited and have another writ of error, but if the party be in execution, he shall not have *superfedeas*; per Cur. Br. Error, pl. 140. cites 2 H. 7. 12.——Br. *Superfedeas*, pl. 23. cites S. C.

But per Cur. if he be not in execution nor taken, he may have *superfedeas* in the second writ of error, though he had *superfedeas*, before in the first writ of error. Br. *Superfedeas*, pl. 23. cites 2 H. 7. 12.

——Br. Error, pl. 140. cites S. C.

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——Br. Error, pl. 140. cites S. C.

——Br. Error, pl. 140. cites S. C.

——Br. Error, pl. 140. cites S. C.

5. Where

5. Where a writ of *error abates by death* of one of the parties, or by demise of the king, he shall have *superfedeas* again in a new writ of error. Br. Error, pl. 140. cited 2 H. 7. 12. Per Jaye. Br. Superfedeas, pl. 23. cites S. C. — Abatement of writ of error by death of parties, or of Ch. J. or by act of Court, does not hinder but that the 2d writ be a *superfedeas*; per Cur. Keb. 658. pl. 40. Hill. 15 & 16 Car. 2. B. R. Tremain v. Sands.

6. After execution awarded, a *superfedeas* issued *quia improvide emanavit executio*, but no clause of restitution was in the *superfedeas*; whereupon it was said that the execution was made before the execution was awarded. And upon that the Court awarded a new *superfedeas*, with a clause of restitution reciting all the matter. Mo. 466. pl. 661. Pasch. 39 Eliz. Core v. Hadgill.

7. In form on the judgment was pronounced 16 November 18. and writ of error was brought, bearing teste 27 November, and then allowed, and in *majorem cautelam* a *superfedeas* made against executions, and yet the demandant obtained a writ of *seisin*, bearing teste 9 die Octobris before, by warrant of the judgment which was afterwards entered but as of octab. Mich. being the last continuance; which being opened to the judges, and they well knowing that judgment was not pronounced till 16 Nov. so that the tenant could not have a writ of error before, neither ought the defendant to have a writ of *seisin* before, for by this trick any writ of error might be defeated, as to saving possession; and therefore a new *superfedeas* was awarded against that writ of execution *quia erroneus*, &c. Hob. 329. pl. 404. Clanrickard v. Lisle.

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(E. 2) Error. Superfedeas. From what Time. See (D).

1. TRESPASS; the plaintiff recovered; the defendant sued writ of error returnable mense Michaelis, and after sued another writ returnable 15 Martini; and because it founded in delay of the plaintiff, there at the prayer of the plaintiff the Court awarded execution, because the But it was said that as so the party may have super cease execution; quia fur their hands are not c that for this is directed to not; cites 6 H. 6. 7, 8. 73.

2. Detinue, the plaintiff has verdict for him of the thing demanded, and 40s. damages, if the thing may be obtained, and if not, 20l. damages for all, and judgment is given to recover the thing, and 40s. damages, and distringas issued to deliver the thing demanded returnable octabis Hilarii, and at the day the sheriff returned issues, and the defendant neither came nor delivered the thing; and after the 4th day of octabis Hilar. comes writ of error; and the plaintiff prayed judgment and execution of the 20l. and to have it entered upon the 4th day, which is before the writ of error came, and could not have it; for by the coming of the writ of error the hands

hands of the justices are closed; quod nota. Br. Error, pl. 80, cites 22 H. 6. 41.

12 Mod.
517. S. C.
in the same
term, but
a D. P.

3. A *capias* was returnable the 1st day of Hil. term, and in the afternoon of that day a writ of error was brought returnable in Cam. Scacc. the next day. Per Holt Ch. J. It has been a vexata questio, whether the suing out the writ, or the notice thereof to the plaintiff or his attorney, were what superseded the execution? If the writ be tested after return of the *capias*, it does not supersede it. If a *capias* be out, and execution thereon, and then writ of error, it shall not discharge the execution. And the ancient opinions have been, that a writ of error is a *superfedeas* from the actual purchasing of the writ, but that the party shall not be punished for executing it till notice, but still it avoided the execution. 12 Mod. 501, 502. Pasch. 13 W. 3. B. R. *Spurraway v. Rogers*.

4. But note, Clark the Secondary told me, that a writ of error was not a *superfedeas* till a certificate taken out from the clerk of the errors, and served on the party. 12 Mod. 502. cites 6 Mod. 130. *Parker v. Woollaston*.—[Quære if this was said by Holt, or is a note of the reporter.]

(F) By Certiorari. Of what Thing a Certiorari shall be a Superfedeas.

[1.] If a man be bound in a recognizance to appear at the next general assises, and in the mean time to be of the good behaviour, and after the recognizance is removed by certiorari into the King's Bench, this shall be a *superfedeas* in law for the good behaviour, M. 37 El. B. R. by Fenner and all the Clerks.]

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Fol. 493.

In *assumpsit*
to save harm-

[2. So this certiorari shall be a *superfedeas* of his appearance at the assises. M. 37 El. B. R. by Fenner and all the Clerks, but Popham e contra.]

less the plaintiff from a recognizance, in which he was bound for defendant's appearance at next assises in S. the defendant pleaded that he brought a certiorari directed to the justices of gaol delivery, which writ was delivered to them such a day, and allowed by them. Upon demurrer this plea was held ill; for though the certiorari removes the recognizance, yet it excuses not the appearance, but defendant ought to have appeared, and procured his appearance to have been recorded; and for his non-appearance his promise is broke. Cro. J. 281, 282 pl. 2. Trin. 9 Jac. B. R. *Rosie v. Pye*.—Yelv. 207. S. C. adjudged that the action lies: for though the certiorari be the command of the king, yet the purchasing it is the act of the defendant, who cannot by a sleight save his recognizance. And this was the opinion of the whole Court. — Bull. 155, 156. S. C. adjudged. And though the certiorari ties up the hands of the justices, yet they might very well have entered his appearance.—2 Hawk. Pl. C. 204. cap. 27. s. 65. cites S. C. And the Serjeant says that this opinion seems to be supported by the better authority, and that the opinion in Roll above would be highly inconvenient.

3. If justices of peace receive a certiorari, all that which they do after is without warrant, but all which the sheriff does after upon their warrant before, is not erroneous; and yet their negligence is punishable by attachment as contempt. Mo. 677. pl. 921. Hill. 44 Eliz. B. R. *Prince v. Allington*.

If a certiorari be directed to

4. Stat. 21 Jac. cap. 8. s. 5 & 6. Whereas indictments of riot, forcible entry, or assault and battery found at the quarter-sessions, are often

often removed by certiorari, all such writs of certiorari shall be delivered at some quarter-sessions in open court; and the parties indicted shall, before allowance of such certioraries, become bound unto the prosecutors in 10l. in such sureties as the justices shall think fit, with condition to pay to the prosecutors within one month after conviction, such costs as the justices of peace shall allow; and in default thereof it shall be lawful for the justice to proceed to trial.

justices of peace to remove an indictment found before them, they cannot proceed, although the record is not

removed. The 21 Jac. 1. cap. 8. does not extend to indictments of felony, but only to lesser acts against the peace, as riots, trespasss, forcible entry, and the like: they may proceed in these cases, notwithstanding such certiorari, if he that sues out such certiorari does not enter into a recognizance with sureties, to prosecute it with effect, and to pay costs to him against whom the trespass was committed, if the defendant does not prevail. Jenk. 181. pl. 64.

Two men and their wives indicted upon the statute of forcible entry, brought a certiorari to remove the indictment into B. R. Some of them refused to be bound to prosecute according to the stat. of 21 Jac. cap. 8. and therefore, notwithstanding the certiorari, the justices of peace proceeded to the trial. It was resolved, that whereas the statute is (the parties indicted, &c. shall become bound, &c.) That if one of the parties offers to find sureties, although the others will not, yet the cause shall be removed; for the denying of one, or any of them, shall not prejudice the other of the benefit of the certiorari which the law gives unto them; and the woman cannot be bound. Mar. 27. pl. 63. Trin. 15 Car. Anon.

And it was farther resolved, that where the statute says, that the parties indicted shall be bound in the sum of 10l. with sufficient sureties, as the justices of the peace shall think fit; that if the sureties be worth 10l. the justices cannot refuse them, because the statute prescribes in what sum they shall be bound. Like to the case of commillion of sewers, 10 Rep. 140. a. that where the statute of 3 H. 8. cap. 5. enables them to ordain ordinances and laws according to their wisdoms and discretions, that it ought to be interpreted according to law and justice. Mar. 27. pl. 63. Anon.

And here it was farther resolved, that after a certiorari brought, and tender of sufficient sureties, according to the statute, all the proceedings of the justices of peace are coram non judice. Mar. 27. pl. 63. Anon.

5. A certiorari was sued out here, and not delivered to the justices before they had awarded restitution on the statute of forcible entry 8 H. 6. but before any restitution was actually made upon their warrant. And by Twisden, the hands of the justices are closed by the issuing of the certiorari, though they be not in contempt for what they have done before the delivery of it, but they ought to have awarded a superfedeas immediately upon the receipt of the certiorari, and because they did not, the party had a restitution nisi. 1 Keb. 93. pl. 79. Trin. 13 Car. 2. B. R. The King v. Spelman.

(G) What Certiorari shall be a Superfedeas. How [91] the King may grant.

[1. D. 8 El. 253. 98. the queen granted the custody of the heir of Kniveton to Cordel; Kniveton being seised in fee of land held in capite, conveys it to the use of himself for life, remainder to C. his feme in tail, remainder over to the right heirs of him and his wife. And the queen granted to the said Cordel custodiam omnium terrarum & tenementorum heredi predicto descendendum seu pertinentium ut filio & heredi dicti Kniveton. Per consilium wardorum, grantee shall have the ward of the body [and] marriage of the heir by the first words, wardship being saved by the statute for alienation to his feme. But the grantee shall not have

This seems to be entered here by mistake of the printers.

the lands which appertain to the queen, because the grant is of lands which descend from Kniveton.]

• See (A)
pl. 6.—
And see
Audita Querela.

(H) By * *Audita Querela*.

[1.] If a man bound in a statute merchant be taken in execution, and his land extended, and liberate awarded, and after he brings audita querela, he shall have a superfedeas for his body; for this does not discharge the body absolutely, but only for the time; so that he may better prosecute the suit; for he shall be in execution again, if his audita querela does not aid him. M. 5 Ja. B. between WHIDNER AND CONYERS, per Curiam adjudged.]

[2. But in the said case no superfedeas shall be granted for the land and goods, because they cannot grant a superfedeas after the execution served and executed. M. 5 Ja. B. between WHIDNER AND CONYERS adjudged.]

[3. But upon an audita querela before execution had, a superfedeas may be granted, as well of the land and goods as of the body. M. 5 Ja. B.]

Br. Superfedeas, pl. 18. cites 24 E. 3. [4. An audita querela upon a statute, shall be a superfedeas in law of the execution upon it. 24 E. 3. Audita Querela, 11.]

S. C.——The cousee of a statute-staple purchased part of the land, and the plaintiff another part, and yet be sued out execution, and caused the land of the plaintiff to be extended, and delivered to him in execution. This was held to be a good cause for an audita querela. Then a superfedeas was moved for to stay execution; for though the lands were extended, yet they were not delivered by liberate. The Court doubted, because it was on a statute-staple, which was not returnable in this Court, but in Chancery; but it might well be upon a statute-merchant, that being always returnable in this Court. But the prothonotaries saying, that it well lies in this Court in this case, and that a superfedeas should be awarded, as it was in Lord DUDLEY's case, and that divers other precedents accorded therewith, the Court afterwards resolved, that it well lay here, and a superfedeas was thereupon awarded. Cro. E. 364. pl. 27. Mich. 36 & 37 Eliz. C. B. Charnock v. Sir Tho. Gerard.

Note, that a man in execution shall not have a superfedeas upon an audita querela, unless it be grounded

[5. In an audita querela, if there be any ground for it of record, or in writing, the plaintiff shall have a superfedeas to stay execution against him; but otherwise it is, if it be but only matter in fact, though the matter for which the execution was sued was usurious, or upon an escape. P. 10 Ja. B. between MOSTON and PARRY, per Curiam.]

upon a specialty; but he shall have an audita querela upon a surmise, if he put in bail, &c. but not a superfedeas. Cook Ch. j. advised every student to take notice of that; and after in many cases it was ruled accordingly. Noy, 145 Anon

† E. obtained a judgment against P. and had satisfaction upon it, and gave a release to the defendant; yet afterwards takes out a capias ad satisfaciendum against him, whereupon he brings his audita querela, and moves the Court, that he may have a superfedeas to the capias ad satisfaciendum. The Court desired to see the release, and upon view thereof the rule was, that the party should proceed in his audita querela; but said, they would grant no superfedeas, because the release was ambiguous. Sty. 294. Trin. 1651. Pickering v. Emma.

† [92]

6. If a man be nonsuited in a writ of error, or audita querela, once, he shall not ever after have superfedeas or audita querela to be a superfedeas for him, but writ of execution may be executed upon him; for the first writ is a superfedeas in itself, but the other, which is purchased after the nonsuit, is not a superfedeas, in itself; per Hobard. Br. Superfedeas, pl. 37. cites 6 H. 7. 16.

7. Pending

7. Pending an *action* brought by an *administratrix*, the son of the intestate, by *convin* between the debtor and him, obtained other *letters of administration* to be granted to the *feme* and him jointly, without any notice taken of annulling the former; and then, after judgment, he released to the debtor all demands and executions. But the *administratrix* sued to execution, and thereupon the debtor brought an *audita querela* with a *superfedeas* in it; and whilst that was depending, the 2d *administration* was repealed, and the repeal pleaded in bar to the *audita querela*, and adjudged against the plaintiff. D. 399. pl. 46. Hill. 17 Eliz. Anon.

8. *Mainpernors* were in *action of debt* for damages and costs; and *scire facias* issued *de debito & damnis*, and judgment was given against the *mainpernors*; and now a *superfedeas*, *quia erronee*, was moved for, because after execution made; for they were not *sureties* for the debt. Doderidge J. told them, they were put to their *audita querela*. 2 Roll. Rep. 431. Trin. 21 Jac. B. R. Cole v. Varnon.

(I) By Habeas Corpus.

[1.] IN an *action upon the case* in an inferior court, if after issue joined, a *habeas corpus* to remove the body and cause is delivered by the defendant in the court there, and pays the fees for allowance of it there; and yet after they proceed there to try the issue, and thereupon a verdict and judgment given, this is error, and in writ of error it may be assigned for error; for the *habeas corpus* was a *superfedeas* in law. Trin. 8 Car. B. R. between JOHNSON and ELLIS, adjudged in writ of error, and judgment given in Maidstone reversed accordingly.]

S. C. cited per Holt Ch. J. 12 Mod. 546. in case of Cross v. Smith.—Cro. C. 261. pl. 7. Ellis v. Johnson, S. C. accordingly, though it was objected

not to be error, because the *habeas corpus* was not alledged to be upon record, and so the error assigned not triable.

2. Debt was brought in an inferior court upon a bond of 200l. not made within the jurisdiction. After issue joined a *habeas corpus* was awarded thither to remove the cause; but they proceeded notwithstanding, and the judge of the court was an attorney only, and not an utter barrister. And it was resolved, that after the *habeas corpus* delivered, the proceedings were ill, and not warranted by the statute 21 Jac. cap. 23. And the proceeding after to trial and judgment were also void, and thereupon a *superfedeas* was awarded; and the judges of B. R. being informed thereof, agreed, that their course in B. R. was to disallow proceedings in an inferior court, after an *habeas corpus* delivered, unless it were a cause arising in the vill or corporation. Cro. C. 79. pl. 1. Mich. 3 Car. C. B. Clapham's case.

3. Per Cur' if a *habeas corpus* be directed to an inferior court, returnable 2 days after the end of the term, yet the inferior court cannot proceed contrary to the writ of *habeas corpus*. North cited the case of STAPLES, steward of Windsor, who hardly escaped

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escaped a commitment, because he had proceeded after a habeas corpus delivered to him, (though the value were under 5l.) and would not make a return of it. 1 Mod. 195. pl. 27. Hill, 26 & 27 Car. 2. in C. B. Haley's case.

(K) After an Arrest.

Br. Imprisonment,
pl. 21. cites
S. C.

1. **I**F a man purchases superfedeas, and is taken by capias by the sheriff in the same suit, *before that the superfedeas comes to the sheriff*, but the superfedeas is delivered to the sheriff before the return of the capias, and after the sheriff returned cepi corpus, there the superfedeas shall not serve; contra if the superfedeas had been delivered to the sheriff before the writ served by the arrest. Br. Superfedeas, pl. 36. cites 19 H. 6. 43.

2. If a man is *arrested at the suit of the king*, he shall not have superfedeas in C. B. per Babb. quod tota Curia concessit. Br. Superfedeas, pl. 1. cites 9 H. 6. 44.

3 Bull. 96.
S. C. accordingly.
— Roll.
Rep. 240.
pl. 10. S. C.
and judgment for the
plaintiff, by the assent of
Coke, Croke,
and Doderidge,
Haughton
saying nothing.

3. It was moved, that the *sheriff* though he has a superfedeas, yet is not bound, upon pain of *false imprisonment*, to allow thereof; but may return the writ and the prisoner with the superfedeas, and the Court may discharge him; and therefore there is difference where the *arrest is before the superfedeas*, and where *after*; for that it is unlawful in the last, but not in the first case, and cites 2 H. 7. 19. 19 H. 6. 43. 9 E. 4. 3. But all the Court held, that the superfedeas was as good cause to discharge him, as the first process was to arrest him, and he *must obey it at his peril*; and in regard he has not done it, he is chargeable with false imprisonment; and the detaining him in prison is a new caption, and he may well declare of caption and imprisonment. Cro. J. 379. Mich. 13 Jac. B. R. Withers v. Henley.

(L) Out of what Court.

1. **I**N *false imprisonment* the defendant was condemned, and ca. sa. & exigent upon it *issued in the county of O. and another ca. sa. & exigent upon it issued in the county of E.* and therefore he came into the Chancery, and had superfedeas upon mainprize of 400 marks, and for fine of the king; and another superfedeas to the justices of Bank to surcease. And by some this superfedeas is contrary to law. But Finch. surceased, because it came out of a higher court; and so there was no further process. Br. Superfedeas, pl. 5. cites 15 E. 3. 19.

2. In debt the plaintiff recovers upon an obligation in C. B. and the defendant brings writ of error in B. R. and pending this the first plaintiff brings writ of debt in London upon the same obligation; the defendant shall have superfedeas in B. R. and not in C. B. Br. Superfedeas, pl. 11. cites 11 H. 4. 73.

3. Where

3. Where a void office is adjourned into the Exchequer-chamber, and there argued and found void, superfedeas shall be awarded in the Exchequer-chamber, and rehearsing the patents granted to the patentees, and that they shall not intermeddle; quod nota. Br. Superfedeas, pl. 30. cites 5 E. 4. 7.

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4. If an accountant in the Exchequer be impleaded in C. B. the Exchequer may fend superfedeas to them to surcease. Br. Superfedeas, pl. 38. cites 9 E. 4. 57.

5. And if he be impleaded in B. R. those of the Exchequer will shew the record of account, &c. for they cannot make superfedeas to the king; for there the pleas are held coram rege, and not coram justiciariis, and he shall be dismissed. Br. Superfedeas, pl. 38. cites 9 E. 4. 57.

6. A man sued in court christian, and the other obtained prohibition, and notwithstanding the other sued forth and got capias and excommunicatum against his adversary, by which he surmised this matter in court of Bank, and prayed superfedeas. Thorp bid him go to Chancery; Morrice said, the Chancery cannot grant it, as long as this court is open. Thorp said, this is true; and thereupon he granted the superfedeas. Br. Superfedeas, pl. 13.

7. C. B. after execution awarded, and writ of error delivered there, may award a superfedeas before execution executed. Jenk. 93. pl. 80.

(M) In what Cases and Actions.

1. ACCOUNT against W. N. where there were 2 of the name, and * W. N. appeared, and prayed, that the plaintiff count against him; and the plaintiff said, that he is another of the same name, and not the defendant; by which the plaintiff had another process against the defendant, and the other had writ that he should not be grieved, and that the sheriff should not take him; which was a special superfedeas as it seems, and the diversity of the names was also put in the process. Br. Superfedeas, pl. 35. cites 21 E. 3. 35.

* All the editions are J. N. which seems to be misprinted.

2. A man distrained 2 sheep, and the owner brought replevin; and the defendant by covin affirmed plaint in court of franchise against the plaintiff, to the intent to have those goods attached, so that they should not be replevied; it was said the plaintiff shall not have superfedeas for the chattels, but for his person; but, per Laicon, he shall have superfedeas for both. Br. Superfedeas, pl. 34. cites 16 H. 4. 8.

3. Trespass upon the case against the bishop of Lincoln for claiming the plaintiff as villein, they were at issue; and pending this the temporalities of the bishop were seised into the hands of the king, by which came writ to the justices rehearsing all the matter, and commanding them quod non procedant rege inconsulto, by which the justices ceased; quod nota. For if the plaintiff be villein he is parcel of the manor to which, &c. and so a loss to the king. Br. Superfedeas, pl. 40. cites 2 R. 3. 13.

4. It

4. It was held for law, that in writ of *attaint* a man shall not have *superfedeas* to disturb execution; for the verdict shall be intended true quousque, &c. Contra in writ of error; for it may be intended that error is, &c. Br. Superfedeas, pl. 24. cites 5 H. 7. 22.

5. And, by some, *superfedeas* does not lie upon certificate of *assise*, for the same reason, *quære inde*. Br. Superfedeas, pl. 24. cites 5 H. 7. 22.

* [95]

If a man
sues out an
audita que-
rela to avoid
a statute-
staple, or

statute-merchant, he shall have a *superfedeas* to the sheriff not to do execution, hanging the plea, &c. F. N. B. 240. (A) cites Regist. 113.

F. N. B.
239. (B)
S. P. cites
Regist. 67.
—The
Court was

7. A *superfedeas* lies not to take a man on an *excommunicato capiendo*; or if he be taken, that then he deliver him donec placitum dicti attachiamenti fuerit discussum, &c. F. N. B. 64. (D).
moved to *superfede* a writ *de excommunicato capiendo*, for that it was too general. It was insisted upon, that the motion for the *superfedeas* was made too early, the sheriff not having returned the writ; and cited 1 Sid. 181. Parker Ch. J. said, if the Court of B. R. cannot grant a *superfedeas* before the return, the consequence will be, that a subject may for a long interval of time, viz. between the delivery of the writ to the sheriff and his return, be wrongfully deprived of his liberty, without possibility of redress. In fact, these writs have not been *superjeded* before their return; but I see no reason why they may not. A *superfedeas* was granted accordingly. 10 Mod. 350, &c. Hill. 3 Geo. 1. B. R. King v. Theed.

8. *Superfedeas* lay in a *nativo habendo*. See F. N. B. 77. (C), (D).

9. If a man be sued, and a *capias* or *exigent* be awarded against him, he may by his friend sue forth a *superfedeas* out of the place where the *capias* or *exigent* was awarded against him, or out of the term he may sue forth a *superfedeas* out of the Chancery directed to the sheriff, that he take sureties of him, and to appear at the day, &c. and that he let him at liberty, or he may find sureties in the Chancery to appear at the day of the return of the *capias* or *exigent*; and upon this he shall have a *superfedeas* to the sheriff, that he let him go, if he have arrested him thereupon, and if he have not arrested him, that then he do not arrest him, but suffer him to go in peace. F. N. B. 236. (A).

F. N. B. 81.
(A) S. P.

10. If one sues a *supplicavit* out of Chancery to arrest another, to find sureties of peace, the defendant who is arrested may have *superfedeas* in Chancery to the sheriff, commanding him not to arrest him. F. N. B. 238. (F).

F. N. B. 39.
(H) S. P.

11. In a court-baron, or any other court, as in London, in writ of right, if the tenant vouches a foreigner to warranty, the tenant who vouches shall have a writ of *superfedeas* directed to the Court, to surcease the plea until the warranty be determined. F. N. B. 239. (A) cites the Register, 5. 11, & 13.

12. It lies upon a writ of *homine replegiando*. F. N. B. 239. (C) cites Regist. 79, 80.

13. If

13. If *trespass vi & armis* be brought in the county, a superfedeas lies to the sheriff, &c. where the plea is holden, reciting that a plea of *trespass vi & armis* shall not be held in a less court than before the king, or other justices by his command. F. N. B. 239. (D) cites Regist. 111.

14. If an order or rule be made by the Court, that execution shall not issue, or if judgment be entered before it be pronounced, although execution be executed, in these cases it shall be set aside by a *superfedeas quia improvide emanavit*. Jenk. 93. pl. 80.

15. If the plaintiff in a writ of error be nonsuit, or does not remove the record before the day of the return of the writ of error, or if there be too long a day between the teste and the return of the writ of error, no superfedeas shall avail in these cases, because of the manifest delay of justice. *Justitia non est neganda non differenda*. Jenk. 93. pl. 80.

16. It was resolved by all the judges, that error is a superfedeas to the writ of inquiry. Mar. 89. pl. 142. Pasch. 15 Car. Anon.

(N) For what Causes.

[96]

1. **D**EBT against 2, the one was at the exigent, and the other at the distress, and he at the distress came and demanded the plaintiff, and he did not come, and was nonsuited; by which the other had superfedeas omnino, because nonsuit against the one in action personal, is nonsuit against both. Br. Superfedeas, pl. 6. cites 1 H. 4. 4.

2. *Trespass vi & armis* in B. R. against T. S. who pleaded not guilty, and was found guilty, and the plaintiff had judgment; and for the king *capias pro fine* was awarded against the defendant, and after exigent for the king issued against the defendant, and when 3 counties were passed the king sent privy seal to the justices of B. R. for the defendant rehearsing the matter, commanding them to surcease to make process for the king; and that if they had made process, that they should make superfedeas; and yet the plaintiff prayed process for the king, and the defendant contra, and prayed superfedeas; and upon good argument, in the end he had superfedeas; quod nota, upon privy seal; for though the fine of the king arose upon the suit of the party, yet pending the process not served, the king may cease his own process at his pleasure; for the party shall not compel the king to sue against his will, but if he was taken by the process, the king shall not set him at large till the party be satisfied; for per omnes, the plaintiff may take this for his execution, if he will. Br. Superfedeas, pl. 26. cites 4 E. 4. 16.

3. Superfedeas *quia erroneice emanavit* was in debt against 3 by several *pracipes*, and execution is against the one only. Br. Superfedeas, pl. 28. cites 4 E. 4. 39. and 5 E. 4. 4.

Br. Executions, pl. 96. cites S. C. —So where debt is

against 4, upon one and the same obligation, and 2 are condemned by default, and execution is sued against them, they shall have superfedeas *quia erroneice*, which manner of superfedeas shall not issue but only upon a record; quod nota. Ibid. cites 5 E. 4. 5.

4. If

• Orig. is
(bon).

4. If indictment be insufficient, the justices ex officio, by the information shall send superfedeas. Br. Superfedeas, pl. 30. cites 5 E. 4. 7.

5. So if exigent be awarded * where no exigent lies. Br. Superfedeas, pl. 30. cites 5 E. 4. 7.

6. In assise it was said, that if *diem clausit extremum* issues, and after *superfedeas* comes to the escheator to surcease, this had been adjudged void; for the *diem clausit extremum* is the suit of the party, and by other way he cannot have his land; and therefore he shall be delayed of his suit; and the statute of 2 E. 3. cap. 8. wills, that by the great seal nor the petit seal, the justices shall not surcease to do right: but quære if the superfedeas shall not be allowed against the *diem clausit extremum*? it seems that it shall. Br. Superfedeas, pl. 25. cites 5 E. 4. 132.

7. In replevin the sheriff returned *quod averia elongata sunt*, and the defendant appeared, and notwithstanding *withernam* was awarded, which was erroneous, by reason of the appearance of the defendant, by which *superfedeas* issued to the sheriff to surcease, &c. and if he had taken them to re-deliver them to the defendant, and the sheriff returned that before the *superfedeas* came, he had delivered the beasts of the defendant to the plaintiff in *withernam*; and he went to the plaintiff to have re-delivery, and he esloigned them; and the defendant appeared and pleaded that he did not take the beasts, and prayed *withernam*, &c. Br. Superfedeas, pl. 32. cites 7 E. 4. 15.

[97]

8. A. has judgment in debt against B. and a *ca. sa.* against him; B. is taken by force of it; his attorney informed the Court that he had a writ of error in this case before the execution executed, which writ of error he had not with him at the time of the execution. B. was committed in execution, ut supra; for B. ought to have delivered the writ of error before the *capias* was awarded, or after it was awarded, and before execution to have a *superfedeas*. By the justices of both benches. *Vigilantibus subserviunt jura.* Jenk. 92. pl. 80.

9. A. has a *ca. sa.* against B.—B. has a *superfedeas* thereto in his pocket; B. is taken upon it by the sheriff, and immediately delivers the *superfedeas* to the sheriff, this shall discharge him from execution. *Quæ fiunt incontinenti, inesse videntur.* Jenk. 92. pl. 80.

10. Though the statute 3 Jac. cap. 8. be general, yet it is to be intended in such cases where it is against the party himself upon his obligation, or in case where the judgment is general against the executors; but where the judgment is special, that it shall be of the goods of the testator, and damages only de bonis propriis, it is not reasonable, nor is it the intent of the law that the party should be enforced to find sureties to pay the intire condemnation with his own goods. And according to this difference Coke said it had been ruled in C. B. when he was there. And Man the secondary said, that the precedents of this Court ever since the statute made were, that a *superfedeas* had been allowed upon a writ of error brought by the executor or administrator. Cro. J. 350. pl. 2. Mich. 12 Ja. B. R. Goldsmith v. Plat.

11. Upon a verdict a rule was given for judgment upon the Thursday, and upon Saturday after the plaintiff died. A writ of error

error was moved for, because, as was said, the party died before judgment, inasmuch as of course after verdict and rule for judgment there are 4 days to move in arrest, and so he died before judgment absolutely given, and moved the Court for a superfedeas. It was agreed to be *in the discretion of the Ch. J. ex officio, to allow a writ of error*; but because it was a cause of great consequence he took the advice of the Court, and it was agreed, that a writ of error is a superfedeas in itself, yet it is good to have a superfedeas also; and if the writ of error had been allowed, the Court could not deny the party a superfedeas. But because the writ of error was not allowed, and also because no error appeared to the Court, for where judgment is entered this shall relate to the time of the rule given, it was resolved that no writ of error should be allowed, nor any superfedeas granted. Poph. 132, 133. Mich. 15 Jac. B. R. the Earl of Shrewsbury's case.

12. D. acknowledged a *statute-merchant* at Gloucester in 300l. and the statute did not limit any day of payment, and yet an extent was sued, and upon motion a superfedeas was awarded; for that it is no statute, because they had not pursued the authority given by the statute; for the statute of Acton Burnell, 11 E. 1. says, if the debt be not paid at the day, &c. And though debt upon an obligation is payable presently, if the day be not expressed, yet here the statute appoints a day certain. Hutt. 42. Mich. 18 Jac. Davie's case.

13. A. had judgment against B. who paid part of the money, and A. acknowledged satisfaction of so much; and then they agreed, that if B. did not pay the residue by such a day, then it should be lawful for A. to take out execution against B. without suing any *scire facias*, though after the year. The money was not paid at the time, and execution being taken out without a *scire facias*, a superfedeas was moved for, because the writ *improvide emanavit*, &c. And the Court held it good cause to discharge him, but said, it was in their discretion to grant a superfedeas, or put the defendant to his writ of error. Win. 100, 101. Mich. 22 Jac. C. B. Hickman v. Fish.

14. The defendant was taken in London on a *ca. sa.* by a bailiff of Middlesex, and thereupon moved for a superfedeas, for that the arrest was false. The Court agreed, that a superfedeas cannot be granted *quia executio erronee emanavit*, which it did not, because the execution was well granted, and if it be returned by the sheriff generally, it ought to be intended well served, though affidavit be made to the contrary; but a habeas corpus was granted. Het. 30, 31. Trin. 3 Car. Mrs. Row's case.

15. In case for words spoke in London, the defendant justified for a matter arising in Suffolk; the plaintiff replied, *de injuria sua propria*, and upon issue procured a *scire facias* to London. A superfedeas was moved for and granted, because the venire facias ought to have issued in Suffolk; and the prothonotaries ought to enter upon the roll *ideo præceptum est vicecomiti Suffolk*. Litt. Rep. 314. Mich. 5 Car. C. B. Harvey's case.

16. When

16. When a *procedendo* unduly vel *improvidē* emanavit, it is usual to grant a superfedeas, but because in the principal case the *procedendo* was well awarded, the whole Court denied to grant a superfedeas. Cro. C. 486, 487. pl: 11. Mich. 13 Car. B. R. Bower v. Cooper.

17. The Court was moved, that a writ of *error* was brought to reverse a judgment, and that it *was received and allowed*, and notwithstanding which, the *plaintiff took out execution*, and thereupon it was prayed for a superfedeas to supersede the execution, and for an attachment against the party for his contempt to the Court. It was urged, that the writ of error was not duly pursued because the *roll was not marked*, and therefore the party might well take out execution. But Roll Ch. J. answered, that the writ was well pursued, though the roll were not marked; yet if neither the roll be marked, nor notice given to the attorney on the other side of the bringing the writ of error, if the party proceed to take out execution, it is no contempt to the Court; otherwise it is a contempt: and it is the duty of the clerk of the errors to mark the roll and not the attorney's, and therefore take a *superfedeas quia improvidē* emanavit to stop execution. Sty. 159, 160. Mich. 1649. Mercer and Rule.

18. A peer was arrested by a bill of Middlesex, and in custody of the marshal of B. R. and thereupon moved for a superfedeas; because being a peer he ought not to be arrested. The Court directed him to plead his privilege, and said, they could not take notice thereof upon a motion. Sty. 177. Mich. 1649. B. R. The Earl of Rivers's case.

19. After error directed to Twisden, but never delivered, another writ was procured directed to Hales Ch. J. by whose creation the other ceased, and no notice is given of it, but within the four days before allowance execution is taken, and per Cur. on 13 Car. 2. stat. 2. c. 2. no bail being yet given, and the four days past, they cannot supersede in action of battery, notwithstanding BATEMAN's case, which was between COTTON AND DAINTRY; and per Hales Ch. J. execution before bail put in is good. 2 Keb. 770. pl. 55. Pasch. 23 Car. 2. B. R. Nichols v. Deacon.

After judgment reversed by writ of error defendant had a superfedeas, but before she was thereby discharged, she was charged with a new declaration at plaintiff's suit, and upon application to

20. The defendant was arrested, and no declaration being filed against him within two terms after the arrest, he procured a superfedeas and was discharged, and immediately afterwards he was arrested again by a *capias* out of C. B. at the suit of the same plaintiff, and for the same cause of action; and upon a motion to discharge these proceedings because irregular, the Court was of another opinion, for that the defendant had a right to supersede the action because no declaration was filed against him in time, and as he had a right to supersede that action, certainly the plaintiff must have liberty to proceed in another; for his debt is not lost for want of declaring in time, but only that action is gone, and therefore a new action may be brought. 8 Mod. 306. Mich. 11 Geo. 1725. Henley v. Rolfe.

the Court was discharged by rule from the new declaration, and her superfedeas was allowed; after her discharge, the plaintiff could not be arrested and held to bail for the former cause of action, whereupon she

the Court to be again discharged by superedeas upon entering a common appearance, and upon hearing counsel on both sides, the Court was divided in opinion, Lord Ch. J. and Comyns J. looked upon the 2d declaration to be no charge, and that the Court took it so when a rule was formerly made for her discharge; and thereupon she had the benefit of her superedeas, and that after the judgment reversed and annulled, plaintiff had a right, if he thought fit, to bring a new action. Denton and Fortescue J. were of opinion, that after the defendant had been discharged by rule of court, as to the 2d declaration she ought to be now discharged on entering a common appearance, and that the rule of court amounts to the same thing as a superedeas. No rule. Notes in C. B. 266, 267. East. 9 Geo. 2. Peachey v. Bowes, spinster.

For more of Superedeas in general, see Audita Querela, Bail, Certiorari, and other proper titles.

Supplicavit.

(A) In what Cases granted, and how.

1. **I**N *supplicavit of the peace* the sheriff may make precept to take the body; for it is not like to re-disseisin where the sheriff is judge and officer; but when the *bailiff* has taken the body, he *shall not take surety*, but the sheriff himself shall do it; per Choke. For it is a judicial power given to the sheriff by the writ of *supplicavit*, which cannot be assigned over; for a judge's power cannot be given over. Br. Office and Off. pl. 39. cites 9 E. 4. 31.

2. Several persons had made *disturbance in the church*, and pulled out the minister reading the divine service (viz. the common prayer) in the church, and carried him to the compters. Upon articles exhibited, the Court upon motion granted a writ; and further advised to inform against the same. 290. pl. 104. Pasch. 14 Car. 2. B. R.

3. A *supplicavit* was made for the body of a man who had been taken for a good behaviour article. *And the Court granted the writ* which per Curiam was granted. *And the Court granted the writ* good behaviour article. *And the Court granted the writ* articles should be *in bonis*, but the writs were *in bonis* and so it was granted: 2 Keb. 305. pl. 2. Holt. 19. and 20. Car. 2. B. R. Musgrave v. Sir John Pullington

4. A writ of *supplicavit* issued upon a petition and articles exhibited. The defendant insisted, that the said writ issuing on petition, and not on a motion in court, nor any endorsement made on the back of the writ, as by the form of the statute is required, and but three of the said articles being sworn to, it is irregular; but the court on reading precedents, notwithstanding the objections

aforesaid, was fully satisfied, that the supplicavit was well granted and warranted. 2 Chan. Rep. 68. 24 Car. 2. fol. 390. Stoell v. Botelar.

[100] 5. M. was taken upon a supplicavit out of Chancery, and brought before Jones J. of B. R. by *habeas corpus*, and bound by recognizance to him to appear the first day of the next term, which he did, and being in court, Maynard moved that the articles sworn in Chancery might be read here, and that they would bind him here, which the Court refused, for that they have no record before them, and the record in Chancery is not duly transmitted hither; but if the witnesses that swore to the first articles had been here and swore to them in court they would have done it, otherwise not, and this was at two several motions by Maynard; but the opinion of the Court was contra. Skin. 61. Mich. 34 Car. 2. B. R. Mullineux's case.

Lev. 53.
S. P. Per
Cur. but
Foster Ch. J.
said, if any

6. Upon motion in B. R. for a supplicavit, Withens J. said, you must first exhibit your *articles in parchment*, and then move us. Comb. 28. Mich. 2 Jac. 2. B. R. Glover & Uxor. v. Glover. ——— Sid. 67. pl. 420 S. C. by name of Bill v. Field. And says, the statute will, that no supplicavit shall be put upon articles exhibited.

7. When a supplicavit is moved for upon articles exhibited to the Court in parchment, &c. the *plaintiff swears* that he moves not for this out of hatred, &c. but for fear of his life, &c. Comb. 28. Mich. 2 Jac. 2. B. R. The King v. Lewis.

8. Upon a supplicavit the parties are to give *security by bond* to the sheriff to appear in this court, and when they come here they enter into recognizance. Comb. 427. Trin. 9 W. 3. B. R. Russell's case.

9. Upon articles filed by A. against B. upon oath of assault and battery, and that he went in fear of his life, Ld. C. Macclesfield granted the writ, which commanded B. to find *sureties* for a twelvemonth, ordering it to be *indorsed for 4000*l.* for the party and his sureties be bound in.* And upon motion to discharge the order, or at least to lessen the sum, B. being *only tenant for life of his estate*, and mentioned the statute (of 21 Jac. 8.) which gives costs in case of a groundless and vexatious complaint of this nature, Ld. C. Macclesfield refused, and said if B. complains of vexation, he comes too soon, let him stay till the year is out, and behave himself quietly all that time, and if the *sum be too great for his circumstances*, there ought to be an *affidavit* to prove this; and so denied the motion. Mich. 1723. 2 Wms.'s Rep. 202. Clavering's case.

10. After an *imprisonment for 15 months* upon a supplicavit, and no prosecution commenced against the defendant in all that time, the party was *discharged* on very slender security. Gibb. 268. Pasch. 4 Geo. 2. B. R. Grosvenor v. Edwards.

11. If a *recognizance* be taken pursuant to a writ of supplicavit, it must be wholly governed by the directions of such writ. 1 Hawk. Pl. C. 129. cap. 60. §. 15.

12. This

12. This writ is *not much in use* at this day. 1 Hawk. Pl. C.
128. cap. 60. f. 10.

For more of Supplicavit in general, see Good Behaviour,
Return, (C), Surety of the Peace, and other proper
titles.

Surety.

[101]

(A) *In what Cases to be found.*

See Bail, &c.

1. *I*N writ of right after battle joined, the demandant and the
tenant shall find surety of the battle at the day appointed, viz.
for their champion, each two pledges, and the tenant shall first find
surety, but upon no pain. Br. Surety, pl. 25. cites 1 H. 6. 7. 7.

2. Action upon the case for calling him villein, and the defendant
claimed him as his villein, and had taken part of his goods; by which
it was awarded that the plaintiff find surety that he do not esloign
his goods, and the defendant find surety that he shall not seize
any more of the goods of the plaintiff, till it be tried if he be his
villein or not. Br. Surety, pl. 30. cites 13 H. 7. 17.

(B) Surety. Chargeable. How far.

1. *I*N a scire facias upon a recognizance for rent and farm of the
excise, as farmer thereof, he pleaded the act of general pardon
12 Car. 2. which excepts the rent but not the security; and by an ex-
planatory act made anno 15 Car. 2. the securities of their sureties were
made liable, but nothing is said of the farmer's own securities. But
the Court held, that a fortiori the farmer's own securities should
be liable, because the explanatory act mentions the securities of
the sureties only: and it is strongly implied, by omitting them
out of the latter act, that the parliament had no doubt upon
them, but that they were excepted out of the act of oblivion.
Besides, the securities of farmers and their sureties are but the same
securities in law; for all are principals with respect to the king. And
since the sureties are bound, a fortiori the principals shall. And
judgment was given accordingly. Hard. 424. pl. 1. Trin. 18 Car. 2.
in Scac. The Attorney General v. Beston.

The reporter observes, that the bond was for money lent; and though the surety had no advantage, yet the obligee had parted with his money, and loss is as good a consideration for a promise, as benefit or profit. Ibid.

2. The obligee in a bond of 20 years old, exhibits his bill against the administrator of the principal, and the surety (upon loss of his bond). The administrator says, by his answer, that he has no assets. Upon hearing the cause, it was directed to a trial, whether the surety had sealed and delivered the bond, and a verdict had passed against the surety, (viz.) that he had sealed and entered into the bond. And the cause coming back to this court, and the plaintiff's counsel praying a decree for the plaintiff's debt against the surety, Serjeant Fountain (not of counsel on either side) said it was doubtful whether equity should in this case bind the surety, who was not obliged in law, but in respect of the lien of the bond; and that being lost, and the surety having no benefit by, nor consideration for, being bound, he thought equity, after so long a time, should not charge the surety. The Master of the Rolls said, he would see to moderate and mediate this matter between the parties, in order to which he was several times attended by the plaintiff; and the defendant making default, he decreed for the plaintiff. And afterwards the cause was upon a case made brought before my Lord Chancellor, who was of opinion with the Master of the Rolls, and decreed it for the plaintiff. Chan. Cases, 77, 78. Mich. 18 Car. 2. Underwood v. Staney.

[102] 3. J. S. was indebted to J. D. by bond of 1000 l. to perform an award. By the award 250 l. was due to the obligee; J. D. put the bond in suit against J. S. A bill is exhibited here to be relieved against the suit, and an injunction awarded on recognizances to abide the order on hearing. J. S. and F. as his surety, are bound in the recognizance, which was penned to pay what should be reported due by N. H. a master named in the defeasance or condition; but the master died before any report made, and so also did the obligor, who died intestate worth nothing. By the strict penning of the defeasance the recognizance is not suable at law, because no report was made by the master; but the great question was, if the surety, who was not liable in law, should be made liable in equity; for the plaintiff had good remedy for a just debt, and justly proceeded to recover it; but the Court staid his suit, and takes ill security, which proves so, and the debt lost thereby; and therefore the Court is bound to do us right; and the intent of the Court was, that the debt, if due, should be secured, and the intent was not with reference to this or that master's report; for suppose that the Court had, during the life of the parties, transferred the references to another master, and he had made a report that should have bound; and in case of a bond lost, this Court have made a surety to pay it. Yet the Lord Chancellor contra; for the party is but a surety not bound by law. 2 Chan. Cases, 22. Hill. 31 & 32 Car. 2. Simpson v. Field.

4. A. and B. infants were made executors: administration during their minority was granted to M. their mother. Upon granting the administration the prerogative court took the usual bond from M. in which J. S. and W. R. defendants were bound as her sureties. B. died, but made his will, and A. executor; A brought his bill for an account of the testator's personal estate, and

and as to J. S. and W. R. *suggested that by fraud and covin they had got up their said bond, and procured insufficient security to be accepted by the prerogative court in lieu thereof.* The Lord Keeper, upon the first opening the matter, declared he would *not charge the sureties further than they were answerable at law*; and as to that part dismissed the bill. Vern. 196. pl. 193. Mich. 1683. Ratcliffe v. Graves & al'.

5. A bond creditor shall, in the court of Chancery, have the benefit of all counter-bonds or collateral security given by the principal to the surety; as if A. owes B. money, and he and C. are bound for it, and A. gives C. a mortgage, or bond, to indemnify him, B. shall have the benefit of it, to recover his debt. Abr. Equ. Cases, 93. Mich. 1692. *Maure v. Harrison.*

6. A. is bound as a surety in a recognizance dated 5 May 1660, for payment of money, which happened not to be made good by the convention act for confirming judicial proceedings, the act not extending to that day. A. being a surety only, and having no consideration for entering into this recognizance, the Court would not make it good, nor allow it to be so much as a debt. The Lord Keeper dismissed the bill. 2 Vern. 393. pl. 364. Mich. 1700. *Sheffield v. Ld. Castleton & Uxor.*

7. A. tenant for life, with power to charge the premises by lease, mortgage, or otherwise, with 6000 l. mortgaged part for 1500 l. And afterwards, upon assignment over of the said mortgage, B. eldest son of A. and who was the remainder-man in tail, covenanted to pay the mortgage-money; and the assignee covenanted to reassign to B.——A. died, and then B. died. It was agreed by Lord C. King, L. Ch. J. Raymond, and the Master of the Rolls, that the personal estate of B. is not liable to pay off this mortgage, in case of the lands mortgaged; the charge being made by A. in pursuance of his power, and therefore the next remainder-man must be content to take the land cum onere; that this being * the original debt of A. his personal estate, if any were, would be liable; but B.'s personal estate ought not to be charged with A.'s debt; and notwithstanding B.'s covenant to pay, this covenant, since the land was the original debtor, will be considered only as a surety for the land, and therefore a bill by the next remainder-man to charge the personal estate of B. in case of the land, was dismissed with costs. 2 Wms.'s Rep. 591. 596. Hill 1731. *Evelyn v. Evelyn.*

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Sel. Cases in Chancery, in Lord King's Time, 80.

Mich. 1730, S.C.—S.C.

argued Gibb. 131 to 144.

and there, in pag. 142. it was argued,

that the covenant of B.

the son, created a

personal debt, and

consequently such a debt

as the personal estate

is to discharge, and

not the real estate, ac-

ording to

the constant course of equity; and as to the objection, that the real estate is the principal debtor, so it is in all mortgages; and yet in all cases, where there is a competition between the real and the personal estate, that is preferred; which is the reason that the practice of the Court requires, that in all cases where the heir is to be charged, the executor must be brought before the Court. To this point was cited the case of Sir JOHN NAPPER and the Lady EFFINGHAM, which was, that a great part of Sir John Napper's estate was in mortgage. Then died Sir John, Sir Theophilus being his heir, who, upon his inter-marriage with the Lady Effingham, settled a jointure upon her, and covenanted to pay Sir John's debts. Then died Sir Theophilus, possessed of a considerable personal estate, which came to his lady, the Lady Effingham; against whom Sir John Napper, the heir at law of Sir Theophilus brought his bill, to have the personal estate of Sir Theophilus, upon his covenant, applied in discharge of the mortgages; and so it was decreed. But to this it was answered, that the principal case differs from that of Sir John Napper cited; the reason of which was, that part of the estate of the mortgagor was settled by a private act of parliament, in trust to pay his debts; which estate, so settled in trust, was disposed of by Sir Theophilus, and then it was but just and equitable, that his personal estate should be

applied to exonerate the mortgaged estate descended to the heir at law, because he was answerable for the trust estate, settled for that purpose. My Lord Chancellor, upon the last argument, said, it could not be expected the Court should then deliver their opinion; so that the matter stood thus for the judgment of the Court. Gibb. 142. 144. Mich. 4 Geo. 2. in Canc. in case of Evelyn v. Evelyn, and Evelyn v. Booth & Uxor.

(C) Disputes between Sureties themselves.

But where A. and B. were bound with J. S. for the proper debt of J. S. to W. R. who sued A. only on the said bond. A. brought his bill against B. to make him contribute to pay the debt and damages, J. S. being insolvent; and the Court was of opinion, that B. ought to contribute a moiety; and decreed W. R. to assign over the bond to A. and B. to help themselves against J. S. for the said debt. Chan. Rep. 120. 13 Car. 1. Morgan v. Seymour.

1. **A.** And B. were bound with J. S. as sureties in an obligation. A. was sued upon the bond, and the whole penalty recovered against him: he exhibited an English bill into the court of requests against B. to have contribution. A prohibition was moved for to the court of requests, and granted; because by entering into the obligation, it became the debt of each of them jointly and severally, and the obligee had his election to sue which of them he pleased, and take forth execution against him. And the Court said, that if one surety should have contribution against the other, it would be a great cause of suits, and therefore the prohibition was awarded; and so it was said, it was lately adjudged and granted in the like case, in Sir WILLIAM WHORWOOD's case. Godb. 243. pl. 338. Hill. 11 Jac. in C. B. Wormleighton v. Hunter.

Toth. 103. S. C.—Where one obligee, that is a surety, is sued alone, by the custom of the city of London, he shall make his co-sureties contribute. Vern. 456. pl. 429. Pasch. 1687. Lyster v. Nelson.

2. The plaintiff and defendant were jointly bound for a third person, who died, leaving no estate. The plaintiff was sued, and paid the debt, and brought his bill against the defendant for contribution, who was decreed to pay his proportionable part. Per Lord Coventry. Nels. Ch. R. 10. Fleetwood v. Charnock.

3. Three are bound for H. in 300 l. and agree, that if H. failed, to bear their respective parts of the money. Two of the obligors borrowed money of A. on their bond, and paid the 300 l. The other obligor was insolvent; and now one of the two became insolvent, and the 3d paid A. the 300 l. The other obligor becomes able. He shall be compelled to pay a 3d part, not a moiety. Chan. Rep. 150. 17 Car. 1. Swain v. Wall.

Chan. Cases, 246. Hill, 26 & 27 Car. 2. S. C. decreed that B. should contribute a moiety, and not a 2d part only.

A. A., B., and C., are bound in a recognizance for J. S. A. was sued, and paid the money, who afterwards sued the principal debtor upon the counter bond, and had judgment, and took him in execution; but he was discharged upon the 10 l. act. Then A. exhibited a bill against B. to have contribution, C. being dead insolvent; and it was decreed, that he should have contribution. Fin. R. 15. Mich. 25 Car. 2. Hole v. Harrison.

Fin. R. 273. S. C. decreed accordingly to pay a moiety.—S. P. decreed 5 Car. 1. Chap. Rep. 34. in the case of Peter v. Rich.

(D) Surety. *How far relieved in Equity.*

1. A Man was surety for another for debt, and he and others were bound to save him harmless; and after the surety paid the money, and sued them who were bound; and pending this, the original debtor brought a subpoena in Chancery, alleging that before the obligation made he delivered goods to the surety for his indemnification, and prayed a restitution, and that he be not charged; and the plaintiff prayed an injunction against the defendant, that he should not proceed at common law: but because the defendant said, that these goods were delivered for another cause, and so made title to them, the injunction was denied. Br. Conscience, &c. pl. 20. cites 16 E. 4. 9.

2. The plaintiff became bound with defendant's father for payment of money at a day which the plaintiff supposed had been paid accordingly, but it was not. The father dies three years after, upon whose death the obligee puts the bond in suit against the plaintiff; but in respect the bond was continued without the plaintiff's privity, the son (having a good estate from his father) and the feoffees, to whom the son had conveyed those lands in trust, were ordered to sell those lands for payment of the father's debts. Toth. 279, 280. cites 10 and 11 Jac. li. a. fo. 664 and 728. Saunders v. Churchill and Smith.

A surety relieved, where the bond is continued twelve years, without the plaintiff's privity. Toth. 280. cites 12 Jac. fo. 81. Hare v. Michell.

3. The heir of a surety, where the bonds are continued without the privity of the surety, relieved. Toth. 280. cites Mich. or Hill. 5 Car. Moile v. Dom. Roberts.

Nelf. Chan. Rep. 9. S. C. reports 18 thus, viz. about 18

years before the bill filed, Moile the father became bound with one Roscarrock in a bond of 200 l. conditioned for the payment of 100 l. to the Lord Roberts, the defendant, at a certain day long since past. Afterwards the defendant purchased lands of the said Roscarrock to the value of 500 l. which purchase was made about 4 years before Roscarrock's death. After his death, the plaintiff took out administration to him; and being sued upon this bond, exhibited his bill for relief. And in regard of the antiquity of the bond, and for that Roscarrock himself was never sued in his life-time, it was presumed that the defendant did deduct the debt out of the purchase-money; and notwithstanding there were no proofs made of the payment of the money, the Court decreed, that the defendant should be restrained from proceeding at law on the bond.

4. A. was bound as surety for B. and the debt was recovered against A.—A. having no counter-bond, brought his bill to recover the debt and damages against B. which was decreed accordingly by Lord Coventry. N. Ch. R. 24. Ford v. Stobridge. the city of London, he shall maintain an action against the principal. Ven. 456. Patch. 1687. Layer v. Nelson.

Where a surety pays a debt, and has no counter bond, by the custom of

5. J. S. grandfather of T. S. the defendant, and whose heir and executor the defendant is, became bound with A. the father of B. the plaintiff, and whose heir B. is, in several bonds, as his surety for 4000 l. A. conveyed the manor of C. by way of mortgage to J. S. to counter-secure him against the said bonds for 4000 l. A. prevailed with J. S. to become bound with him afterwards for 2000 l. more. Then A. paid off 1500 l. of the 4000 l. The bill

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was to be admitted to redeem upon payment of what J. S. or the defendant himself had paid off, or been dampnified by the bonds for the 4000 l. and what remained unpaid of the 4000 l. And the question was, whether the plaintiff, (inasmuch as there was no agreement proved, that the mortgage was to be a security to J. S. against the bonds for the 2000 l. as well as those for 4000 l.) should be admitted to redeem upon payment of the 4000 l. without the 2000 l. ? Decreed, that *if the plaintiff will redeem, he must save harmless the defendant, as well touching the 2000 l. as the 4000 l.* upon this rule, that *he that will have equity to help where the law cannot, shall do equity to him against whom he seeks to be relieved.* The counsel for the plaintiff said, it was a just decree. Hill, 1667. Upon an appeal to the Lord Keeper Bridgman, the decree was confirmed. Chan. Cases, 97. Hill. 19 & 20 Car. 2. in Canc. St. John, Esq. v. Holford Baronet, and others.

6. Plaintiffs in 1694. were bound as *sureties* for B. and *had counter-bonds.* B. the principal was afterwards arrested, and the defendant his brother became his bail, and judgment was obtained against the bail. The plaintiffs being sued on the original bond, were forced to pay the money; and now brought their bill to have the judgment obtained against the bail assigned unto them, in order to be reimbursed what they had paid. Per Lord Chancellor: the bail stand in the place of the principal, and cannot be relieved on other terms than on payment of principal, interest, and costs; and the sureties in the original bond are not to be contributory. And therefore decreed the judgment against the bail to be assigned to the plaintiffs, in order to reimburse them what they had paid, with interest and costs. 2 Vern. 608, 609. pl. 546. Pasch. 1708. in Canc. Parsons and Cole v. Dr. Briddock & al'.

7. Per Cowper C. where a person is security in a contract, *there is a joint contract* that the principal shall indemnify his security; and the ground of equity is, that when the money is due, the equity arises. But Sir Thomas Powis said, that one may exhibit his bill before the time of payment; but where the land, or land and person are both security, the estate stands at stake to enable the principal to owe it, as well as the security to pay it, or borrow it thereon. And the contract of the security is, that he shall continue to owe it on the credit thereof, and not to go to gaol the next day; for even in a personal security, you must the next day apply for a reimbursement, for what was equity one day, is equity the next. 6 Equ R. 69. Pasch. 7 or 9 Ann. in case of Hungerford v. Hungerford.

sec(512). (E) Surety favoured, how; to enable him to recover his Debt.

1. A. Seised of lands in fee, was made receiver by the Master of the Rolls of an infant's estate, and entered into a *recognizance*

recognizance to the Master of the Rolls to account yearly, and B. and C. joined as sureties. Afterwards A. married, having settled part of the land on his wife before marriage in jointure, without notice of the recognizance to her, or her friends. A. devised all his real and personal estate to B. and made him executor, and died. It was decreed by the Master of the Rolls, that all the personal estate of A. should be first applied to satisfy the recognizance; 2dly, the land devised to B. the surety, the devise being voluntary, and the wife a purchaser; 3dly, the jointure lands, the jointress claiming under A. can be in no better case than A. was. But if the lands devised are sufficient, then the bona paraphernalia shall be enjoyed by the widow; but if insufficient, then the bona paraphernalia must be subject before the sureties lands shall be extended. 2 Wms.'s Rep. 542. Trin. 1729. Tynt v. Tynt.

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2. And though, in case of a recognizance to another person, the jointress should get an assignment, and extend it at law, it was held by the Master of the Rolls, that even at law the sureties might have an audita querela, insisting, that all the principal cognizor's lands, either in his own or the hands of his alienees, ought to be liable before any of the sureties lands be extended, notwithstanding it was objected, that she was a purchaser without notice. 2 Wms.'s Rep. 543. Trin. 1729. in case of Tynt v. Tynt.

3. A. recovered in the court of Lynn against B. and when he was going to take out execution, B. offered to give him a note for the money, and to get one to join in it as security with him; which was done accordingly. After this A. commenced another action against the security, and recovered. Upon which the security paid the money, and now brought his action against the principal for so much money laid out to his use. This matter appearing at the trial, the defendant's counsel excepted, that the action would not lie. But Lord Raymond, who sat as judge of assize, was of opinion, that it would. Accordingly the plaintiff proceeded in his evidence. 2 Barnard. Rep. in B. R. 26. Trin. 5 Geo. 2. Morrice v. Redwyn.

For more of Surety in general, see *Bail*, and other proper titles.

Surety of the Peace.

(A) Lies for, or against whom. And in what Cases.

Serjeant
Hawkins
says, it
seems the
better opi-
nion, that

1. **I** F a man is *afraid of being beat* by J. S. he shall have surety of the peace. *Contra* if he be afraid of imprisonment; for he shall have false imprisonment. Br. Peace, pl. 22. cites 17 E. 4. 4.

he who is threatened to be imprisoned by another, has a right to demand surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man; and the objection that one wrongfully imprisoned may recover damages in an action, &c. and therefore needs not the surety of the peace, is as strong in the case of battery as imprisonment, and yet there is no doubt but that one threatened to be beaten may demand the surety of the peace. Hawk. Pl. C. 127. cap. 60. f. 7.

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It seems
agreed, that
wherever a
person has
just cause to
fear that
another will
burn his

2. The writ of surety of the peace lies when a man is in fear or doubt that another will beat or assault him, and lies properly where one man does threaten another man to kill him, beat him, or assault him; then may he come into the Chancery, and pray to have such a writ unto the sheriff. F. N. B. 79. (G).

house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief, he may demand the surety of the peace against such person. Hawk. Pl. C. 127. cap. 60. f. 6.

Hawk. Pl.
C. 127. cap.
60. f. 4.

3. If the husband threaten his wife to beat or to kill her, she shall have this writ. F. N. B. 80. (F).

says, it is certain that a wife may demand it against her husband threatening to beat her outrageously, and that a husband also may have it against his wife; and cites Dalt. cap. 98. Lamb. 78. Crompt. 133. b. F. N. B. 80. (F), and * 3 Lev. 128.

* This is misprinted, and should be 2 Lev. 128. Hill. 26 & 27 Car. 2. B. R. and is the case of THE KING v. LD. LEE, who upon a habeas corpus granted upon affidavits of ill usage, imprisonment, and danger of her life (as had been done before in Sir Philip Howard's case) brought his wife into court, where they charged each other with unkindness; and she being in court, made oath that she went in danger of her life by him, notwithstanding several affidavits were made in court to the contrary, viz. of his good usage, the Court intended to have bound him with sureties, according to F. N. B. 80. & 239. † (B), but they declared that they could do no more than to bind him, and not to remove her from him.

† This likewise seems misprinted, and should be 138. (E), the last paragraph.

A woman may have the peace against her baron for unreasonable correction. Mo. 874. pl. 1219. in Sir Tho. Seymour's case. — Godh. 215. pl. 307. Mich. 11 Jac. in C. B. in S. C. accordingly.

A matter being before the court of Chancery, relating to husband and wife, and the Court being informed of his ill usage of her, a supplicavit de bono gestu was granted. 2 Vent. 345. Trin. 32 Car. 2. Sir Jerom Smithson's case.

4. Serjeant Hawkins says, it seems agreed at this day, that all persons whatsoever under the king's protection, being of sane memory, whether they are natural and good subjects, or aliens, or at-
tainted

tainted of treason, &c. have a right to demand surety of the peace. But that it has been questioned, whether *Jews or Pagans*, or persons *attainted of præmunire*, have a right to it, or not. Hawk. Pl. C. 126. cap. 60. f. 2, 3.

5. There is no doubt but that surety of the peace ought, upon a just cause of complaint, to be granted by *any justice of peace against any person whatsoever under the degree of nobility, being of sane memory, whether he be a magistrate or a private person, and whether he be of full age, or under age, &c.* But infants and feme covertts ought to find surety by their friends, and not to be bound themselves; and the safest way of proceeding against a peer, is by complaint to the Court of Chancery, or King's Bench. Hawk. Pl. C. 127. cap. 60. f. 5.

(B) *How obtained and granted. And Punishment* See (A) pl. 2. 5. of wrongfully obtaining it.

1. **B**Y the ancient course of law, a man ought to *take his oath* upon a book, before he have this writ, *before a Master of the Chancery*; but now they use to sue forth such writs by their friends, who will sue for them without any oath made; and the same is ill done, because they are many times sued more for vexation than for any good cause; and the justices of B. R. will not grant any writ for surety of peace, without making oath that he is in fear of corporal damage. And the justices of peace ought not to grant any warrant at the suit of any one, to find sureties of peace, if the party, who does require the same, will not take his oath *that he requires the same not for malice, but for the safety of his body.* F. N. B. 79. (H).

2. 21 Jac. 1. cap. 8. f. 2. enacts, That *process of the peace or good behaviour, to be granted out of the Chancery or B. R. shall be void, unless such process be granted upon motion made in open court, and upon declaration in writing, upon their corporal oaths by the parties which shall desire such process, of the causes for which such process shall be granted, and unless such motion and declaration be mentioned to be made upon the back of the writ, the said writing there to be entered and remain of record; and if it shall afterwards appear to the court, that the causes expressed in such writing be untrue, the judges shall award costs and damages unto the parties grieved; and the parties so offending may be committed until they pay the said costs and damages.* [108]

S. 3. *All writs of supersedeas to be granted by either of the courts aforesaid shall be void, unless such process be granted upon motion, and upon such sureties as shall appear on oath to be assessed at five pounds lands, or ten pounds in goods, in the subsidy-books, which oaths, and the names of such sureties, with the places of their abode, and where they stand assessed, shall be entered of record; and unless it shall also appear to the judges that the process of the peace or good behaviour is prosecuted by some party grieved.*

S. 4.

S. 4. The judges of the courts aforesaid, upon proof of any misdemeanors committed in the obtaining of writs of superseas, or procuring surety, may likewise punish the false and insufficient sureties, and the procurers thereof, so as such punishment extend not to life or member.

3. It was said by the court, that if an offender be brought before a justice of peace, *the party ought to tender sureties*; and it doth not behove the justice to demand it. Noy, 70. Colme v. Frome.

4. Every justice of peace is bound to grant it upon the party's giving him satisfaction *upon oath that he is actually under fear* that such a one will burn his house, or do him corporal hurt, or procure others so to do, as by killing or beating him; and that he *has just cause to be so*, by reason of the others having threatened to beat him, or lain in wait for that purpose; *and that he does not require it out of malice, or for vexation.* Hawk. Pl. C. 127. cap. 60. s. 6.

(C) Taken. How, and by whom.

IT is a common opinion, that the security which the sheriff ought to take of the party who ought to find sureties for the peace, ought to be taken *by bond*, that is to say, to bind the party and his sureties by bond, that he keep the peace, and that he burn not the houses, &c. *But now after the statute of 1 E. 3. cap. 16. which appoints that certain persons shall be assigned in the Chancery to keep the peace, there are other forms of writs for the ease of the people who will have the peace against other persons, which writs shall issue out of the Chancery; and some of them are directed unto the justices of the peace, and unto the sheriff, and some are directed unto the sheriff only.* F. N. B. 80. (C).

5. If a man be in variance with other men, and he is *in doubt that damage or hurt will come unto him, or his servants, or his goods, by reason of this variance*, then he shall have a special writ against them, directed to the sheriff, that he cause them to find security that they do not damage or hurt the other in his body, or his servants, or other his goods, in a certain sum, &c. And if they will not find security, that then he arrest them and keep them in prison until they will find sureties; and that the sheriff certify all that is done upon the same into the Chancery, upon pain, &c. as it appears by the register. And that security ought to be taken *by recognizance*, as it seems; taken quare. F. N. B. 80. (G).

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(D) Proceedings after the Writ granted.

If one who fears that surety of the peace will be demanded

1. WHEN a man has purchased writ of *supplicavit*, directed unto the justices of peace, or the sheriff, or both, then *he against whom the writ is sued, may come into the Chancery, and there find sureties that he will not do hurt or damage unto him that*

that sues the writ, *and then he shall have a writ of supersedeas out of the Chancery, directed unto the justices of peace, or the sheriff, or one of them, reciting how that he has found sureties in Chancery according to the writ of supplicavit, and reciting the writ of supplicavit, and the manner of security that he hath found, and the sum of money in which they are bounden, commanding the justices and sheriff that they surcease to arrest him, &c. or compel him to find sureties, &c.* And if they have arrested him for that cause, and for no other, that then they deliver him, &c. And if the party who ought to find sureties, cannot come into the Chancery to find such surety, then his friend may purchase a supersedeas in the Chancery for him, reciting the writ of supplicavit, &c. and that such a one and such a one are bounden for him in the Chancery in such a sum, that he shall keep the peace according to the writ of supplicavit. And the writ shall be directed unto the justices of the peace and sheriff, that they, or some of them, take surety of the party himself, according to the writ of supplicavit for to keep the peace, &c. and that then they surcease to arrest him; and if they have arrested him for that cause, that then they deliver him. F. N. B. 81. (A).

against him, finds surety before any justice of the peace of the same county, either before or after a warrant is issued against him, he may have a supersedeas from such justice, which shall discharge him from arrest from any other justice, at the suit of the same party for whose security he has given such

surety. Also it is said, that an appearance upon a recognizance of the peace, may be superseded by finding sureties in the Chancery or King's Bench; but this custom having been often abused, therefore the statute of 21 Jac. 1. cap. 8. was made, [which see at (B) pl. 2.] Hawk. Pl. C. 128. cap. 60. s. 14.

2. Sometimes the writ of *supplicavit* is made *returnable into the Chancery at a certain day*; and if it be so, then if the justices do not certify the writ, nor the recognizance, and the security which is taken, the party who sued the *supplicavit* shall have a writ of *certiorari*, directed unto the justices of peace, to certify the writ of *supplicavit*, and what they have done thereupon, and the security which is found, &c. and so the party shall have such *certiorari* unto the justices of the peace, to certify the security taken upon *supplicavit*, although the writ of *supplicavit* be not returnable in the Chancery. F. N. B. 81. (B).

3. If a man demands surety of peace in the county against any man, he shall find sureties in the county before the justices of the peace, &c. He who demands the security may sue a writ of *certiorari*, directed unto the justices of peace, to remove the surety of peace, and the recognizance taken thereupon, and to certify that recognizance and security taken, under the seals of the justices of peace, or one of them. F. N. B. 81. (C).

(E) Breach what, and punished how.

1. Surety of the peace is not broken without affray made, or battery, but surety *de bene gerendo* may be broken by a number of people, and by their harness, &c. Br. Surety, pl. 12. cites 2 H. 7. 2.

2. But it was held, that he who is bound to the peace, ought to demean himself well in his behaviour and in company, not doing

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Surety of the Peace.

ing any thing which shall be a cause of breaking of the peace, or of putting the people in dread, fray, or trouble; and so it shall be intended of all concerning the peace, but not in misdoing of other things which do not concern the peace. Br. Surety, pl. 12. cites 2 H. 7. 2.

3. If a man has sued a writ against one directed unto the sheriff, and the sheriff take security of him to keep the peace, and afterwards he *breaks the peace* against him who demanded the same; he who demanded the surety of peace shall have *attachment* against him who found this surety. F. N. B. 80. (A).

4. And upon this writ the plaintiff shall *recover damages*, and the defendant shall be *fined for his contempt*, if he be found guilty. F. N. B. 80. (A).

(F) Cases relating thereto.

Br. Pledges,
pl. 17. cites
S. C.

1. **T** *Respass by bill*, where the defendant came *versus curiam regis* of C. B. to have answer in a plea of land, there came the defendant and assaulted, wounded, and menaced him, so that he durst not carry his charters and come without great costs, in contemptum regis, contra pacem & ad damnum, &c. & tam pro rege quam pro seipso sequitur by bill in C. B. and the defendant pleaded not guilty; and the defendant was compelled to find pledges of his good behaviour and the peace, and that he should do nothing to the plaintiff privately nor openly, by himself nor by others, &c. Br. Surety, pl. 11. cites 30 Aff. 14.

2. In surety of the peace against a prior or abbot, he himself shall be bound with the sureties; but if it be chanon or monk, the sureties only shall be bound for him. Br. Surety, pl. 9. cites 36 H. 6. 23.

3. Where a man finds surety to keep the peace, and has day *mensse Pasche*, he ought to appear at the day, though the party who demands the peace does not appear; otherwise he shall forfeit his bond; contra in action between party and party; the defendant who is bound to appear upon *capias* to keep his day, shall not forfeit his bond by his default, if the plaintiff does not appear at the same day. Br. Surety, pl. 10. cites 39 H. 6. 26.

4. In writ of privilege at London out of B. R. the sheriff of London returned *inter alia*, that the party was arrested for surety of the peace, and therefore he who took the peace was demanded in Bank, and if he did not come the prisoner should be discharged of the surety of the peace; but if he came and demanded surety of the peace, the surety of the peace should be granted to him in Bank; but the surety in London should be discharged. Br. Surety, pl. 13. cites 2 H. 7. 4.

(G) Pleadings.

1. **W** *HEN* a justice takes surety for the peace, it is not sufficient to say, that I. N. invenit sufficientem securitatem de
pac.

pace, without naming the names of the surety and their sums, but he ought to name their names and sums. Br. Surety, pl. 13. cites 2 H. 7. 4.

For more of Surety of the Peace in general, see **Good Behaviour, Supplicabit**, and other proper titles.

Surmise and Suggestion.

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(A) In what Cases sufficient.

1. **THOUGH** no process be awarded against the king's debtor, yet if he be present in the Exchequer, he shall answer to the king immediately; per Ludlow. Per Fitzjohn, in case that it appears of record that he is debtor to the king, then he shall answer, but not upon surmise or suggestion; but there he shall come by process. Br. Surmise, pl. 26. cites 40 Aff. 35.

2. Suggestion was made in Chancery, that the prothonotaries of the king had given certain land to R. C. grandfather to the lord C. that now is, in tail, and that R. father of the lord purchased licence to infeoff certain persons of the same land, and retook to him and Joan his feme in tail, the remainder to his right heirs, upon which suggestion issued *scire facias* to T. M. who had espoused the feme of R. if he knew any thing to say why the king should not have restitution of the issues of the land during the nonage of the heir, who is now lord C. in ward of the king; who came and said, that the *scire facias* is not founded upon any record or office but upon suggestion, and tendered a demurrer, *et non allocatur*; by which he would have taken advantage of the warranty made by the feoffor; but it was said for the king, that because the licence was obtained in deceit of the king, he not perceiving his right, this cannot discontinue the revenue of the king, and therefore the king shall have the ward, and the mesne issues; and by award the baron was charged of issues in right of two parts and discharged of the third part; for she has thereof cause of dower: and so see that suggestion or information shall serve in lieu of an office. Br. Surmise, pl. 30. (bis) cites 40 Aff. 36.

Br. Surmise,
pl. 9. cites
S. C. and 2 s
Aff. 15. ac-
cordingly.

3. And if the land tailed the reversion to the king be recovered in value against the tenant in tail, and he dies, his heir within age, yet the king shall have the ward of the heir. Br. Surmise, pl. 30. (bis) cites 40 Aff. 36.

4. In

4. In trespass where the *defendant* is returned in *issues* upon the *distress*, a man cannot surmise that he is dead, and pray that the process shall cease; but *this* ought to come in by the return of the *sheriff*, and not by suggestion. Br. Surmise, pl. 15. cites 22 E. 4. 1.

5. In appeal, the *defendant* confessed the felony and took to his clergy, the *plaintiff* made suggestion that he was taken at his *fresh suit* in *Middlesex*, whereupon the court wrote to *Middlesex* to inquire of the *fresh suit* and found it, and he had restitution. Br. Surmise, pl. 21. cites 2 R. 3. 13.

[112] (B) In what Cases sufficient to support Actions.

1. **I.** *N. sued execution upon a statute-merchant, and writ issued to extend the land, which writ was not returned, and the conusor came and said that execution is made, and prayed venire facias upon audita querela; and it was granted to him upon this surmise, notwithstanding the writ was not returned.* Br. Surmise, pl. 11. cites 39 E. 3. 30.

2. If an obligation is made by two, and the obligee brings action against the one, he may surmise that the other is dead or is an infant, or is a feme covert; and so where the obligation is made to two, and the one brings the action, he may surmise that the other is dead, or a monk professed. Br. Surmise, pl. 20. cites 32 H. 6. 30, 31.

3. Attaint upon conspiracy brought against 2, and the one pleaded not guilty, and the other pleaded another plea, and the issue found against both, and the one alone brought attaint, and assigned the false oath in all that was said against him where they found damages of 100l. against both, and there the plaintiff was compelled to abridge his demand of the damages, for those are intire, and to proceed with his attaint of the principal. And there it was argued by divers, that he may make surmise that the whole execution was levied upon him, and so to maintain the attaint alone of the whole; et non allocatur; for it shall be intended that the execution was made as the judgment is, and as it is sued; and therefore judgment was as above, that he shall abridge his demand of the damages; quod nota. And so it seems that such surmise shall not serve. Br. Surmise, pl. 1. cites 34 H. 6. 30 & 35 H. 6. 19.

4. A man shall not have writ of *melius inquirendum* upon surmise. Br. Surmise, pl. 17. cites F. N. B. 255.

(C) In what Cases sufficient to support Action in a Foreign County.

1. **I.** *N quare non admittit, the sheriff at the distress returned the bishop nihil, by which the plaintiff said that he had assets in London, and prayed distress there, and had it.* Br. Surmise, pl. 2. cites 3 H. 4. 4.

2. In

2. In *detinue* the defendant prayed garnishment, and had it, 2 *nibils* were returned, and the defendant surmised that the garnishee had land in another county, and prayed process there, and had it upon his surmise. Br. Surmise, pl. 13. cites 6 E. 4. 11.

(D) In what Cases sufficient to enforce the doing a Thing.

1. [F the tenant in *assise of novel disseisin*, obtains writ to the justices to send it into B. R. and the justices deliver it to the tenant, and he retains it, there upon suggestion the plaintiff may have writ to take the body of the tenant to deliver the record. Br. Surmise, pl. 4. cites 1 Aff. 14.

2. Suggestion was made in B. R. that J. S. was indicted of felony in the county of D. before the justices of peace, and was imprisoned for it in D. and prayed the Court to send for the body of the record. Knivet J. said, we will not write without seeing the record before us, but you may have writ in Chancery to remove the body and the record before us. And so see that they would not grant his prayer upon suggestion. Br. Surmise, pl. 10. cites 41 Aff. 22. [113]

3. *Homine replegiando*; the defendant avowed the imprisonment of the plaintiff as his villein regardant, &c. and the other said that frank, &c. and so to issue, and the plaintiff suggested that the defendant had taken his goods, and prayed deliverance; to which the defendant said nothing; by which writ issued to make deliverance, and the defendant took exception to the allegation of the plaintiff, saying that this is a count without original; et non allocatur; for it was said that it was a surmise, and not a count, by which he had his goods without surety to re-deliver them to the avowant, if the issue passed for the defendant. And per tot. Cur. the attorney of the defendant shall gage deliverance well enough. Br. Surmise, pl. 12. cites 5 E. 4. 8.

4. *Matters of record* ought not to be stayed upon the bare suggestion or surmise of the party; but there ought to be an affidavit made of the matter suggested, to induce the Court to ground a rule for staying the proceedings upon the record. (Mott 4650. B. R.) For the law favours not the stopping of the proceedings in law, except there be very good cause for it. L. J. R. 537. tit. Suggestion.

(E) In what Cases sufficient to enforce the doing a Thing. Pleading.

1. [N debt of 20 l. upon an obligation, the defendant pleaded acquittance, that the plaintiff had acquitted him of 20 l. due to him, for 20 s. rent bought by the defendant of the plaintiff; and therefore the defendant surmised in fact, that the plaintiff was seized of the

20 s. rent in D. and sold it to the defendant for the 20 l. which 20 l. is the same 20 l. contained in the obligation of which the acquittance is made. And good matter in inforcing the acquittance; per tot. Cur. and the plaintiff said that he sold to the defendant 20 acres of meadow in D. for the 20 l. for which the obligation was made, absque hoc that the obligation was for the 20 l. which was for the 20 s. rent, prist; and the others e contra, and a good issue. Br. Surmise, pl. 22. cites 3 H. 7. 16.

(F) At what Time. After Judgment.

1. **I**N dower the tenant confessed the action, and the demandant recovered, and after the judgment the demandant surmised that the baron died seised, and prayed writ to inquire of the damages, and had it after judgment; quod nota. Br. Surmise, pl. 16. cites 14 H. 8. 25.

(A) In Pleadings.

Br. Nug-
tion, pl. 10.
cites S. C.

1. **F**Ormedon in descender, and counted of a gift made to one of a reversion by fine in tail, the remainder to his ancestor in tail, and alleged seisin in his ancestor by force of the tail, and conveyed himself heir, and the tenant prayed that he shew the fine, because he counted upon the fine. But per Hill and Hank, he need not; for he has shewed the fine executed; and therefore it is only surplusage, and a thing to which you shall not have answer; and so was the best opinion. Br. Nugaton, pl. 4. cites 11 H. 4. 39.

Surplusage
on the part
of the plain-
tiff or defen-
dant shall
abate the
writ by the
common law;
per Paston
for law;
quod non
negatur.

2. Addition of executor, administrator, carpenter, &c. on the part of the plaintiff, where he is not executor, administrator, or carpenter, or if he be named J. N. of D. where he is of S. this is only surplusage, which shall not prejudice. Br. Nugaton, pl. 11. cites 9 H. 5. 5.

3. Contrary on the part of the defendant in action, where process of outlawry lies; note the difference. Br. Nugaton, pl. 11. cites 9 H. 5. 5.

Br. Nugaton, pl. 2. cites 9 H. 6. 1.

But now in action where process of outlawry lies, he ought to give addition to the defendant; and this shall not abate the writ. Contrary on the part of the plaintiff at this day; per Paston for law; quod non negatur. Br. Nugaton, pl. 2. cites 9 H. 6. 1.

Action against J. N. and assign was cast by J. N. of D. and therefore was disallowed; and so see that surplusage shall hurt on the part of the defendant sometimes. Br. Nugaton, pl. 24. cites 18 E. 4. 4.

4. Debt by J. N. *administrator, &c. or executor, &c. and counts of a duty due to himself*, it is well; for this word executor or administrator is nugation. Br. Nugaton, pl. 18. cites 9 H. 5. 5.

5. Entry in nature of assise of a disseisin done to his father. Fulthorp pleaded *actio non*; for your father, whose heir you are, *infeoffed us in fee without condition*, and gave colour. Newton said he infeoffed you upon condition, &c. and for the condition broken he re-entered, and was seised till by you disseised; and held a good plea and good confession, and avoiding, notwithstanding that the defendant alleged the feoffment to be without condition; for those words (*without condition*) are void, unless the defendant claims by the condition to have the land by the performance of it; by which the defendant said that he infeoffed him simply, *absque hoc* that he infeoffed him upon condition, prout, &c. Br. Confess and Avoid, pl. 45. cites 9 H. 6. 55.

6. *Solvendum to the obligor* in an obligation, is surplusage. Br. Nugaton, pl. 19. cites 4 E. 4.

Br. Obligation, pl. 47. cites 4 E. 4. 29. S. P.

7. Debt against the provost and scholars of a college in Cambridge, because T. M. late provost, predecessor of the defendant, and the scholars by F. their servant, bought 2 bells of the plaintiff for 40 l. here at London, where the action is brought, which came to the use and profit of the college aforesaid; and after T. M. was removed from the provostship, and the defendant was elected and made provost, and the defendant, being often requested, did not pay. And, by some justices, the buying of the provost and the college cannot be good; nor by the abbot and covent, † dean and chapter, baron and feme; for it is only the buying of the dean, provost, abbot, or baron, for the others shall not be but as dead persons in the law. And by some justices the contract is good, and shall be intended the bargain only of the provost, and the name of the scholars is not but surplusage; for the contract of the provost, and the coming to the use of the college, is the effect of the matter. Br. Corporations, pl. 53. cites 5 E. 4. 70.

* All the editions of Brook are (contract); but it seems mis-printed for (college) and that is agreeable to the original. L. 5to E. 4. 73. b. 74. a. † [115]

8. Detinue of charters against J. N. son and heir of J. N. and counted of bailment made by the plaintiff to the defendant; who said, that he is son and heir of W. and not son and heir of J. N. Per Moyle; this is no plea, because it is of his possession, and not brought against him as heir, and so it is surplusage; as in trespass, de son tort demesne is no plea. Br. Traverse, per, &c. pl. 235. cites 10 E. 4. 12.

Contra in debt against him as heir, or in detinue against him as heir. Br. ibid.

9. Writ of entry upon 5 R. 2. that he entered into such land, which N. gave to him in tail; and by award of the Court those words (*which N. gave to him in tail*) were struck out; quod nota, for surplusage. Br. Nugaton, pl. 15. cites 15 E. 4. 24.

10. But where in assise of rent, if the plaintiff makes title in his plaint to a rent-charge, the defendant shall answer to it; for this is material. Note the difference. Br. Nugaton, pl. 15. cites 15 E. 4. 24.

11. In debt upon a bond, if the plaintiff counts that the defendant made it when he was of full age, the defendant may plead nonage, without traversing the full age; for this is not material, nor usual in the count; per Littleton. Br. Nugaton, pl. 15. cites 15 E. 4. 24.

12. Surplusage is *no bar* nor *estoppel*. Arg. Godb. 380. in Brooker's case, cites 9 E. 4. 24. 7 E. 4. 19.

Cro. E. 183.
pl. 6. Pasch.
32 E. 12. S.
C. accord-
ingly.

13. In *trespass* the plaintiff declared, that the defendant vi & armis broke his close and entered; and blada tritici, &c. conculcavit & consumpsit, nec non herbam suam, &c. pedibus ambulando conculcavit & consumpsit continuando transgression' præd' quoad depasturationem, conculcationem, &c. herbæ, &c. The plaintiff had verdict. And it was assigned for error, that the plaintiff supposed a continuance of the trespass in depasturing of the grass, whereas nothing of that was mentioned before; for the trespass was laid in conculcatione & consumptione herbæ, pedibus ambulando. But this was held to be surplusage, and the judgment was affirmed. Mo. 684. pl. 944. Mich. 32 & 33 Eliz. in the Exchequer-chamber. Short v. Hellyar.

2 Bulst. 174.
S. P. in
Heydon's
case, by
Coke; and
that if he
commits

14. When a man meddles with a thing which is but surplusage, which he needed not to do, he must recite the same substantially; otherwise his plea will be vitious. Per Coke Ch. J. Godb. 248. pl. 345. in Sir Christopher Heydon's case, cites 4 Rep. Palmer's case.

any contrariety in this recital, this writ shall abate; and said, that to this purpose it appears at large in Pl. C. 84, 85. in Partridge and Croker's case.

15. It is surplusage for a plaintiff in *trespass* to make a title to himself in his declaration. 2 Bulst. 288. Mich. 12 Jac. Willamore v. Bamford.

16. An action of *trespass* brought, and a *continuando* of the trespass unto the day of the suing forth the plaintiff's original, to wit, the 20th day of November, which day was after the suing forth of the original. And because the jury gave damages for the whole time, which ought not to be, it was moved, that the judgment upon the verdict might stay; but by the whole Court the *videlicet* was held idle, and judgment given for the plaintiff. Brownl. 234. Hill. 13 Jac. Forrest v. Headle.

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Brownl.
235. S. C.
says the
Court was
of opinion,
that it was
helped by
the statute
of jeofails,
and the
word (pa-
ter) was idle,
and judg-
ment was
given for the
plaintiff.

17. In *trespass* for taking his horse, the defendant pleaded, that J. H. was seised in fee, and granted a rent, &c. for which he distrained, &c. * The plaintiff replied, that before the grant of the rent, W. H. was seised, who had issue J. H. the elder, and J. H. the younger; and that he devised his lands to his said 2 sons in tail, and died; and that J. H. the eldest died without issue; and that J. H. the younger had issue A. H. and died; and that the said A. H. gave leave to the plaintiff to put in his horse, absque hoc, quod præd. J. H. pater, was seised in fee, prout, &c. Upon issue it was found for the plaintiff. It was objected, that here was no issue at all, because the defendant had not pleaded quod J. H. pater was seised in fee, as the traverse was. But the plaintiff had judgment; for though pater be added, yet the words, without pater, bind it to that

that person, that the defendant had pleaded; and that (pater) is but John, and can do no hurt, especially since it may stand true that he was pater, as if it had been traversed *absque hoc quid prædictus J. H. generosus, &c.* otherwise if it had been *absque hoc quod præd. W. H.* which could not be taken for the same person. Hob. 116. pl. 144. Trin. 14 Jac. Blackford v. Alkin.

18. In an action of escape against the sheriff, upon a mesne process, the defendant pleaded, that he had taken the party upon a latitat; and that in bringing of him from *Issington prædicto* he was rescued, and so returns the rescue; and exception taken to the (prædicto) because there was *no Issington mentioned before*. But Coke Ch. J. held, that the (prædict.) was surplusage, and idle; and judgment was entered against the plaintiff. 3 Bulst. 198, 199. Trin. 14 Jac. Proby v. Lumley.

So in debt upon a bond to perform or award, the defendant pleads nul agard. The plaintiff replies, and sets out an award,

that the defendant should pay to the plaintiff 66 l. at the house of the plaintiff *apud Sevenoak prædictum*, and assigns a breach in non-payment. And exception was taken to the prædictum, because there was *no Sevenoak mentioned before*; but resolved, that the prædictum was void. But the plaintiff had judgment notwithstanding. Lutw. 551. Mich. 11 W. 3. Lambert v. Kingsford. — S. C. cited 2 Lord Raymond's Rep. 1183. Trin. 4 Annæ, in case of the Queen v. Mackarty and Fordenburgh.

19. J. S. granted a rent-charge to baron and feme, during the life of the feme. The baron dies. The feme survives, and takes administration to the baron. The rent was behind in life of the baron. In replevin the defendant made consuance, as bailiff of the feme, as administratrix of her baron, setting forth the grant. It was objected to the consuance as bailiff to her, as administratrix, when she was intitled by survivorship. But the objection was overruled, because the consuance as administratrix is void, idle, and superfluous. Brownl. 171. Hill. 15 Jac. Brown v. Dunry.

20. Debt upon bond, conditioned to pay 10 l. on the 14th day of July; the defendant pleaded payment on the 14th day of July. The plaintiff replied, that he had not paid it *prædicto 14 die Augusti, quo eidem solvend. fuit*. The jury found, that he paid it on the 14th day of July. Upon a writ of error in B. R. the error assigned was, that the 14th day of August was not mentioned before: but the Court held, that the word (*August*) is only superfluous, and that the issue was not joined upon that, but upon the aforesaid 14th day; and so affirmed a judgment given in C. B. Palm. 74, 75. Hill. 17 Jac. B. R. Halsie v. Bointon.

Cro. J. 549, 550. pl. 12. Mich. 17 Jac. B. R. S. C. by name of Hall v. Bonnythan. But says, that Haughton was contra. — 2 Roll. Rep. 135. Halsie v. Bonnythan.

S. C. adjournatur. Mich. 17 Jac. But Montague Ch. J. and Doderidge, were of opinion as here; but Haughton contra. But they said, that if the replication had been *non solvit 14 die Augusti*, leaving out the word (*prædicto*), then it had not been a good issue joined. And Doderidge J. relied much upon the finding of the jury, because they found the non payment the 14th day of June; but had they found the non payment the 14th day of August, the case had been more dubious.

21. In action upon the statute for *tithes de viginti acris terræ* for three years *de quibus quidem triginta acris*, no tithes were paid, &c. After a verdict for the plaintiff it was moved that it might be amended and made (*viginti*), as it was in the first part of the declaration, and as the truth of the matter really was; but since all the rolls were (*viginti*) it was held not amendable, but it being after verdict the Court thought it well enough, and that the word (*triginta*) in the declaration was only surplusage; for *de quibus quidem*

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quidem acris is well enough, for it cannot be intended but of 20 acres. Sid. 135. pl. 9. Pasch. 15 Car. 2. B. R. Fanshaw v. Mildmay.

S. C. cited
by Powell J.
Ld. Raym.
Rep. 195.
Pasch. 9 W.
3. in case of
Reynoldson
v. Blake.

22. The *distringas* against jurors was *returnable tres Trin. &c. nisi prius venerit M. Hale mil' capital' baro, &c. on such a day ejusdem mensis Junii*, whereas no month of June was mentioned before; after verdict this was moved in arrest of judgment as a discontinuance. The Chief Baron and the whole Court held that the word (*ejusdem*) shall be void, and the word (*Junii*) shall be intended June next ensuing; as a covenant to pay money at Michaelmas, shall be intended Michaelmas next. Hard. 330. pl. 4. Trin. 15 Car. 2. Anon.

23. E. N. the administrator of G. N. brought an action of debt upon a bond due to the intestate, and sets forth that the administration was granted to him, but in the conclusion of his declaration, he says, *profert hic in Curia literas, &c. præfato, &c. G. instead of præfato E.* The defendant pleaded a frivolous plea, and upon demurrer it was insisted for the defendant, because of this variance of G. instead of E. But per Cur. (*præfato G.*) are only surplusage, and shall not vitiate the matter preceding, which was sufficient without them. And judgment was given for the plaintiff. 2 Jo. 219. Pasch. 34 Car. 2. B. R. Nonne v. Maxey.

8 Nelf. Abr.
262. pl. 10.
cites S. C.
out of Lutw.
and says it
was held to
be surplusage.

24. In debt the plaintiff declared upon a *bill penal of 60 l. dated 1 May, for payment of 33 l. on 1 Nov. and averred that the said 60 l. was not paid*, and upon demurrer one exception among others was taken to the declaration, that the plaintiff averred the defendant had not paid *præd. sexaginta libras*, when the word (*sexaginta*) was not mentioned before, and he should have alleged that the said 33 l. were not paid; for otherwise the sum penal did not become due, and yet it is demanded in the action; Curia advisare vult. But the reporter says, quære, if the word (*sexaginta*) shall not be taken to be void, and as if it had not been alleged, there being no such sum of 60 l. by the bill to be paid upon the 1st Nov. and then it is all one as if he had said that the defendant non solvit præd. libras quas solvisse debuit super præd. primum diem Novembris, and cited several cases. Lutw. 445. 450, 451. Mich. 3 Jan. 2. Bell v. Bolton.

25. In debt upon bond for performance of covenants the plaintiff assigned a breach generally; the defendant demurred, for that it is said (*as in the aforesaid indenture is mentioned*) where no indenture was mentioned before, but it was conceived [by somebody, but says not by whom, but only that I conceive] that utile per inutile non vitiatur, and that the word [aforesaid] is not only surplusage but void, as the viz. was in Hob. 169. which in Stukely and Butler's case was deemed void. 2 Sid. 63. Hill. 1657. B. R. Longvil v. Dampport.

I do not find
that any
judgment
given in this
case is men-
tioned in 2
Lutw. 919.

26. Trespas for an assault and false imprisonment for 40 hours; the defendant pleaded that the plaintiff was outlawed, and that a *capias utlagatum* was prosecuted against prædict' John Fowler (the plaintiff) whereas his true name was George, and so justifies by virtue of a warrant on a *capias utlagatum*, and upon demurrer to this

this plea the defendants had judgment; for the plaintiff was named through all the proceedings, but in this place where it was said, that a *capias utlagatum* was prosecuted against prædict' Johannem, therefore the word Johannes shall be rejected as surplusage, and then the plea will be, that a *capias utlagatum* was prosecuted against prædict. Fowler. 3 Nels. a. 262. pl. 11. cites 2 Lutw. 919. Fowler v. Holmes & al'. 1 Lev. 428. S. P. 450. S. P. Yelv. 182. S. P.

&c. which says the case was ordered to be argued again, but that by its not being entered in the prothonotary's book for

argument in ten terms, it is probable it was never argued afterwards; and that as to the point here no authority was cited.—— And as to the books mentioned to be S. P. there seems some great mistake.

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27. The plaintiff declares, that he was seised of an ancient watercourse and mill, and that the defendant being conusant thereof, *diverted the said watercourse so that it could not flow to his mill* for so long time in certain, *eo quod molare non potuit*, &c. After verdict for the plaintiff it was moved in arrest of judgment, that the hindrance of the grinding is designed to be the gist of the action, and therefore it ought to be shewn expressly, but here it is not shewn intelligibly; for it should be *molere*, which signifies to grind, but *molare* has no such signification. Sed non allocatur; for per Holt Ch. J. & totam Curiam, where the *act* implies a tort of itself, a *per quod* is not necessary to support the action, but only aggravates the damages. Now here it appears a tort without the *per quod*; for it is said that the watercourse could not flow to his mill, and therefore it is good, especially after verdict. Judgment for the plaintiff. Ld. Raym. Rep. 102. Mich. 8 Will. 3. Richards v. Hill.

5 Mod. 206. Pasch. 8 W. 3. S. C. and held that the word (*molare*) being insensible, no damages could be given for it, and that the declaration had been good if that part of it had been left out, so that the plaintiff had his judgment.

3 Lev. 435. S. C.

28. The plaintiffs brought *quare impedit* for hindering them to present to the church of Saint Andrew's Wardrobe in London, and aver, that the indowment of the rectory of the church of Saint Andrew's Wardrobe was of greater annual value than the indowment *prædictæ vicariæ ecclesiæ* of Saint Ann Black-frier's. It was objected by the defendant's counsel, that the plaintiffs have not made a sufficient averment as to this point; for the plaintiffs have averred that the indowment of the church of Saint Andrew's Wardrobe is of greater value than the indowment (*prædictæ*) *vicariæ ecclesiæ* de Saint Anne's Black-frier's, whereas no mention was made of any vicarage before, to which this relative word (*prædictæ*) can refer; and so the indowment, which is a substantial part, is not traversable. But the whole Court resolved, that the averment was sufficient, for they would reject the word (*prædictæ*) as surplusage. Ld. Raym. Rep. 192. &c. East. 9 W. 3. Reynoldson v. Blake and the Bishop of London.

29. In trespass the plaintiff declared of *taking cattle at D. parvum prædict.* &c. It was objected that the declaration was ill because no mention was made of D. parvum before, and therefore it is a declaration of a trespass in no place, but the Court said they would reject the (*prædict.*) as surplusage. Ld. Raym. Rep. 237. Trin. 9 W. 3. Lambert v. Cook.

30. In *trespass* of taking cattle the defendant *pleaded a lease from J. S. the plaintiff replied a former lease still in being to him, and traversed the lease to the defendant; the defendant demurred because the plaintiff, non traversat the last lease, &c.* The Court said, that as to the word (non) since it is contrary to the record, they would reject it as surplusage. *Ld. Raym. Rep. 237, 238. Trin. 9 W. 3. Lambert v. Cook.*

12 Mod.
510. S. C.
accordingly.
— Ld.
Raym 669.
S. C. ac-
cordingly.

31. *Indeb. ass.* for money had and received by the defendant for the plaintiff *ad usum of the defendant*, and verdict on non ass. for the plaintiff. Held on motion in arrest of judgment, that those words (*ad usum of the defendant*) should be *rejected* because insensible and repugnant. *1 Salk. 24. pl. 7. Pasch. 13 W. 3. B. R. Palmer v. Stavely.*

5 Mod. 327.
S. C. but
S. P. does
not appear.
— 2 Salk.
451. pl. 2.
S. C. but
S. P. does
not appear.

32. In debt brought by the college of physicians exception was taken, that it was said in the *declaration, that the defendant by the space of so many months ante exhibitionem billæ, scilicet the 23d of August, practised physic, &c.* which was impossible; but it ought to have been from the 23d, &c. To which it was answered and agreed by the Court, that the words *23d of August coming in after a scilicet*, if they were *repugnant* to that which went before, *should be rejected*, and then the declaration would be good for so many months ante exhibitionem billæ. *1 Ld. Raym. Rep. 681, 682. Trin. 13 W. 3. in case of the President and College of Physicians v. Salmon.*

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33. In *error* of a judgment in C. B. the plaintiff assigned the want of an original, to which the defendant *pleads a release of errors* in the said judgment, *et hoc paratus est verificare unde petit judicium si prædictus the plaintiff breve de errore prædictum prosequi aut manutenere debeat & quod idem judicium in omnibus affirmetur.* It was objected to this plea because the conclusion of it prayed that the judgment might be affirmed, whereas it was said it ought to be upon the estoppel; but it was resolved, that the beginning of the plea and the conclusion of it, till you come to those words, *et quod idem judicium, &c.* was proper and right, and therefore the addition of those words should be rejected; and Powell J. said he wondered how it could be fancied to be an estoppel. *2 Ld. Raym. Rep. 1052. Mich. 3 Annæ. Davenant v. Rafter.*

For more of Surplusage in general, see *Abatement of Writs, Arbitrement, Abowry, Judgment, Trial*, and other proper titles.

* Surrender.

* Surrender
sursum red-
ditio pro-
perly, is a
yielding up
of an estate
for life, or
years to

(A) † *What Persons [may surrender]. Good, in respect of their Estates.*

F ol. 494.

[1.] If † two jointenants, and to the heirs of one, he who has for life cannot surrender to his companion for the joint possession in them. 22 H. 6. 51. Curia.]

him that has
an immedi-
ate estate in
reversion or
remainder,
wherein the

estate for life or years may drown by mutual agreement between them. Co. Lit. 337. b. —† See (B) — (C) pl. 1, 2, 3, 4.

† S. P. Put in such case tenant in common may. Mo. 388. pl. 506. Arg. in Perrot's case cites 22 H. 6.

If I infeoff two, habend' to them and the heirs of the one, there he who has franktenement cannot surrender to the other by reason of the joint possession; for there the franktenement cannot merge in the reversion; by reason that he who has the fee is jointly seised of the possession with him who surrendered, and it is not properly a surrender, but where he who surrenders gives possession to him who takes by the surrender. Per tot. Cur. except Port. Br. Surrender, pl. 13. cites 22 H. 6. 51.

[2. Tenant for life may surrender to him in remainder for his life, for his estate for his own life is more high to him than the estate for the life of the lessee. 24 E. 3. 32. b.]

Perk. f. 590. S. P. cites 22 H. 7. 11. and says, that in

the same manner as it is of land it is likewise of all rents, commons, corodies, &c. mutatis mutandis, &c.

[3. If baron and feme jointenants for life are, the baron may well surrender to him in reversion; and this shall bind the baron, though it shall not bind the wife, nor shall be any discontinuance to her; yet this is good surrender during the life of the baron. Contra, 17 H. 7. Kelloway, 42.]

It is not good, because the nature of a surrender is to give absolutely all

the estate for term of life; which cannot be here for the interest of the feme by words of surrender. Kelw. 42. pl. 5. per Frowike.

Perk. f. 612. says, it is a good surrender during the coverture; and if the husband dies before the wife, or if they be divorced, *causa præcontractus*, the wife may enter and defeat the surrender, notwithstanding that he, to whom the surrender was made, died seised of the land in his demesne as of fee, and his heir be in by descent. ~~The same law is,~~ If the surrender be made by the husband and wife, &c.

|| [120]

4. Scire facias to execute a fine by the heir of S. who was in remainder in fee by the fine. The case was, that fine was levied to A. for life, the remainder to J. in tail, the remainder in fee to S. who were three brothers; and after A. surrendered to J. and then S. died without issue, and after J. died without issue; and the plaintiff brought the scire facias to execute the fine, as heir of S. And the tenant pleaded, that A. after the death of J. and S. entered, *que estate he has*, and so the fine executed. And Thorp held, that the surrender of the estate of A. to J. was only the estate of A. and that J. had

J. had the estate of A. but only during the life of A. and that if J. had died, living A. *quod occupanti conceditur*, which seems to be a great error, for Finch contra, and that this was a full surrender. And by this the *estate of A. is merged in the tail, and the estate tail of J. executed*, and his feme shall be endowed; and that J. might have vouched by the warranty of the tail in the life of A. and therefore the plaintiff made another answer to the plea of the tenant; *quod nota*. Per Thorp; if A. had charged and surrendered, J. should hold charged during the life of A. which seems to be law. Br. Surrender, pl. 4. cites 24 E. 3. 9.

5. In assise it was said, that if a man leases land for term of life, and after grants the reversion to J. N. for term of life, and the tenant attorns, and they both surrender, that this is no good surrender to him in reversion for term of life. The reason seems to be, inasmuch as it does not lie in grant, but by deed. But Grene said, it was a good surrender; but he was not precise, but awarded the assise for another cause; *quod nota*. Br. Surrender, pl. 31. cites 47 Aff. 46.

6. A surrender may be made by tenant for term of life to him in reversion, upon condition, well enough; and so it was, viz. *rendering rent, and for default of payment a re-entry*. It seems that this ought to be done by deed indented. Br. Conditions, pl. 156. cites 14 E. 4. 6.

S. P. Br.
Charge, pl.
1. cites 9 H.
6. 52. —
S. P. Perk.
L. 612.

7. Where a feme has a lease for years, and takes baron, the baron may give or surrender, or forfeit it, but he cannot charge it; but the law shall charge it to the king for debt. Br. Surrender, pl. 44. cites 22 E. 4. 37.

8. In writ of entry it was agreed, that the *surrender of one executor is good for both*; *quod nota*. Quære, of the default of one executor, upon receipt after plea pleaded. And the case was, that 2 executors prayed to be received to save their farm by the statute of Gloucester, and after the one made default, and came, and would have surrendered, and was not suffered; for the Court had no warrant but to record his default. The reason seems to be, inasmuch as he is not party to the original, but comes a latere by the receipt. Br. Surrender, pl. 22. cites 21 H. 7. 25.

9. If there be *lessee for years* of land, the remainder of the same land to a stranger for life, the remainder to another in fee, and during the years he in the remainder for life surrenders to him in fee, it is a good surrender. Perk. f. 605.

10. If a sole woman seised of land in fee, leases the same to a stranger for life, and takes a husband, and the lessee grants his estate unto the husband, this is no surrender; and yet the husband is seised of the reversion in fee, which is immediate to the estate of the lessee, viz. in the right of his wife, and not in his own right, &c. Perk. f. 622.

Ow. 83,
Pash.

11. Feme tenant in tail made a lease for years, and then took baron, and died. The baron, being tenant by the curtesy, surrendered to the

the issue. It was held *per Curiam*, that the issue shall avoid the lease. Mo. 8. pl. 30. Pasch. 3 E. 6. Anon. 6 Eliz. in C. B. Powtrel's case,

S. P. exactly, and seems to be S. C. And Dyer doubted whether this surrender be good; because tenant by the curtesy is but in reversion, and has nothing in possession, and it is dubious how he can surrender. But Weston and Brown held, that he may surrender; for a term or franktenement may be surrendered to him that hath the estate in reversion or remainder, if it [there] be not a mesne estate, as tenant for life, the remainder for life, the remainder in fee; the first tenant for life cannot surrender to him that has the fee. But the great point was, whether the issue could avoid the lease during the life of the tenant by the curtesy; and the Court held he could not, for the tenant is in as a purchaser.—Dal. 65. pl. 28. S. C.

12. Surrender cannot be made, but *by one that is in possession.* S. P. unless in special cases. Perk. Per Dyer. Dal. 32. pl. 17. anno 3 Eliz. Anon.

l. 599.—And therefore if *less'e for life*, or for years of land, be ousted of the land by a stranger, and after the ouster, and before his entry, he does surrender unto his lessor, it is no good surrender; because he has but a right at the time of the surrender, &c. Perk. l. 600.

So if a woman has *title to have dower* by the common law, and she surrenders unto him, against whom she ought to have dower, it is a void surrender. Perk. l. 600.

13. A. leases to B. for 21 years. B. makes an *under-lease* to C. for 10 years, and then B. granted the residue of the term to D.—A. leases to E. for 21 years to commence after the determination, surrender, &c. of the lease to B. Afterwards A. grants the reversion to J. S. C. and D. attorned; and afterwards C. and D. surrendered to J. S. Per Cur. the surrender by D. is good; for inasmuch as the interest, which D. had at the time of the surrender, was a reversion in B. after his grant to C. and there it remained, and continued in its nature, as to that point, notwithstanding that by the grant it passed in another manner than as a reversion. 3 Le. 95, 96. pl. 138. Trin. 26 Eliz. in B. R. Gurney v. Saer.

14. Tenant at will cannot surrender. Per Gawdy J. Cro. E. 156. pl. 39. Mich. 31 & 32 Eliz. B. R. in the case of Sweeper v. Randal.

15. A. had 2 sons, B. and C.—A. was tenant for life, remainder to B. and C. for life. C. purchased the reversion in fee; and then A. and B. surrendered to C. without deed. Per Fenner J. the surrender is void; for if it be good, it must first be the surrender of him in remainder, which cannot be without deed; and it cannot be the surrender of the first tenant for life to him in remainder, because there is no word of surrender between them. Cro. E. 269. pl. 9. Hill. 34 Eliz. B. R. Perkins v. Perkins. Le. 176. pl. 250. S. C. accordingly.

16. Tenant by extent may surrender to him in reversion. Per Ventris J. 2 Vent. 328. in case of Dighton v. Greenville, cites 4 Rep. 82. Corbet's case.

17. Bargaine before entry may surrender, assign, or release. Cart. 66. Pasch. 18 Car. 2. C. B. per Bridgman Ch. J. in case of Geary v. Bearcroft.

18. Surrender of leases (made by the limitor of the estate) to *cestuy que trust* (being remainder-man for life in possession) according to a power reserved by the limitor, was held not to pass the estate, the surrenderee having only a trust, and not the legal estate. Skm. 77. Mich. 34 Car. 2. B. R. Lady Stafford v. Luellin.

19. If

19. If after the *lease and release* executed to make the tenant to the *præcipe*, the tenant surrenders to the releasor, this is void; for he has no reversion for the surrender to operate upon. Pig. of Recov. 50.

[122]

See (C)
pl. 8, 9.

(A. 2) The Force and Effect thereof.

1. **RESIGNATION** by the warden of a chapel, parson, prebendary, or such like, pending the writ, shall not abate the writ, by the best opinion there; and yet see elsewhere, that lease of the party who resigns, is void thereby. Br. Surrender, pl. 27. cites 15 Aff. 8.

2. Where the tenant for term of life surrenders to him who right has, or the tenant to his lord, the franktenement vests without livery; per Shard. Br. Surrender, pl. 28. cites 27 Aff. 37. But contra Hank. 12 H. 4. 21. for the tenant has fee-simple; but it appears elsewhere, that where tenant for term of life surrenders to him in reversion or remainder, and he thereby enters, that the franktenement vests without livery. Br. Surrender, pl. 28. cites 27 Aff. 37.

3. If the king gives in fee, or in tail, or for life, and the patentee leases it for years, or leases or gives part of the land in fee, and after surrenders his patent by which it is cancelled, the lessee or donee shall not by this lose his interest; for he may have a constat out of the inrollment, which shall serve him. But see now an act of anno 3 & 4 E. 6. cap. 4. thereof. And quære, if the common law shall not serve; for it appears in libro intrationum, that a man may plead a constat. Br. Surrender, pl. 51. cites 13 R. 2.

Br. Briefs,
pl. 240. cites
S. C.

4. Tenant by the curtesy and the heir within age were, and assise was brought of rent against them, and the tenant by the curtesy surrendered to the heir pending the writ; and per June, he shall not be adjudged in by descent as to the plaintiff to abate his writ, because the taking of the surrender was his own act; and if the tenant by the curtesy had charged, the heir shall hold charged during his life; per Rolfe, if writ of entry be brought against the heir after the surrender, he shall be supposed in by his mother, and not by the tenant by the curtesy. Br. Surrender, pl. 24. cites 1 H. 6. 1.

5. If the tenant breaks covenant in reparations, or such like, and after surrenders, and the lessor accepts it, yet he may have action of covenant. Br. Surrender, pl. 47. cites 27 H. 6. 10.

6. If tenant in tail of the gift of the king surrenders his letters patents, this shall not extinguish the tail; for the inrollment remains of record, out of which the issue in tail may have a constat, and recover the tail, in case of THE EARL OF RUTLAND, by which they made another devise, that the king should grant to him the fee-simple also, and then recovery against him would bar the tail; et e contra, the reversion being in the king. Br. Surrender, pl. 51. cites T. 32 H. 8.

7. A

7. A surrender *determines the interest of all parties but of strangers*. But as to themselves it is determined to all intents and purposes; per Croke J. Het. 21. Mich. 3 Car. C. B. in case of Sir Edward Peyto v. Pemberton, cites 3 H. 6.

8. The Court held, that a surrender *immediately divests the estate* out of the surrenderor, and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which no other act is requisite but the bare grant; and though it be true, that every grant is a contract, and there must be an actus contra actum, or a mutual consent, yet that *consent is implied*. A gift imports a benefit, and an assent to take a benefit may well be presumed; and there is the same reason why a surrender should vest the estate before notice of agreement, as why a grant of goods should vest a property, or sealing of a bond to * another in his absence, should be the obligee's bond immediately without notice. 2 Salk. 618. Hill. 9 W. 3. B. R. in case of Thompson v. Leach.

3 Lev. 284. in Trin.
2 W. & M. in C. B. the same case, Poilexten Ch. J. and Powell and Rooksby J. held that the estate did not pass by the surrender; and for this they relied upon the constant form of

pleading surrenders, in which the precedents always are not only to plead the surrender, but to plead it with an acceptance, viz. to which the surrenderee agreed, unless one or two in Rastall; and divers authorities were cited in the case pro & con. And they held, that after acceptance it shall not be so referred to the making the deed, as to make it by relation a surrender to the prejudice of a 3d person, as to destroy the estate of an after-born son. But Ventris J. held, that the estate vested immediately by the making the deed of surrender, but to be divested by refusal of the surrenderee afterwards to accept it, but that till such refusal the estate is in the surrenderee; but that if it should not vest by the delivery, yet by acceptance after it shall be by relation a surrender from the first, and so destroy a contingent remainder of an after-born son; and that this relation does no wrong to a 3d person, because such son was not in esse at the time of the surrender. But judgment was given according to the opinion of the 3. Whereupon error was brought in B. R. and Hill. 3 W. & M. the judgment given in C. B. was affirmed by the whole Court. After which error was brought in the House of Lords, and in December 1692, upon hearing of the judges, who were all of opinion as before except Atkins Ch. B. then prolocutor of the House of Peers, the judgment was reversed by the lords, Atkins and Ventris concurring with them. — 2 Vent. 198 to 200. S. C. with the argument of Ventris J. at large. — 3 Mod. 296. S. C. argued in B. R. on the writ of error, and the judgment affirmed there; but says that in 4 W. & M. it was reversed in the House of Lords. — Show. 296. Mich. 3 W. & M. S. C. argued. — Carth. 217. S. C.

The case in Hill. 9 W. 3. B. R. was upon another ejectment brought afterwards by the same plaintiff against the same defendant, in which the question was upon the surrenderor's being alleged to be non-compos; and that being found, the surrender was adjudged void. See Carth. 435. Comb. 438. 468. And upon error in the House of Lords upon that judgment, the same was affirmed. See 3 Mod. 301. 311. Show. Parl. Cases, 150. Ld. Raym. Rep. 313. 316. S. C. and 2 Vent. 208. Comyns's Rep. 45. S. C. but imperfect. Adjournatur.

It appears by Carth. 211. that after making the surrender in question, the surrenderor continued in possession, as before, for 5 years, and the surrenderee knew nothing of the deed till 5 years after the execution, and then it was consented to, and not before, within which 5 years the after-born son (who was the plaintiff) was born. — 3 Mod. 296. much to the same purpose. — 3 Lev. 284. says, he knew nothing of it till 5 years after the birth of the son.

* [123]

(B) What Estate. [And to whom.]

See (C).

[1. **T**HE very tenant cannot surrender to the lord. 12 H. 4. 21. 13 H. 4. 13. adjudged. 50 Aff. 1. Contra, 49 E. 3. 5. 27 Aff. 37.]

S. P. Br. Confession, pl. 15. cites 12 E. 4. 20, 21.

[2. The very tenant of the king cannot surrender to him. See (L. 3). Contra, 50 Aff. 1.]

[3. An estate for life may be surrendered. 49 E. 3. 5. 13 H. 4. 13. b. 50 Aff. 1.]

[4. If

Perk. pl.
598. S. P.
cites 20 H.
4. 21. and 34 Aff. 11.

[4. If *tenant in tail discontinues in fee, discontinuance cannot surrender to the issue in tail.* Contra, 34 Aff. 2. adjudged.]

Br. Surrender, pl. 28.
cites S. C.

[5. In a *præcipe*, or other action, where the land is demanded, the *tenant* who is seised *in fee*, may surrender in pais the land to the plaintiff without livery; for he does this by the command of the writ. 27 Aff. 37.]

6. Where a man *leases land for term of years, the remainder over for life, the remainder over in fee, or reserving the reversion, there, he in remainder for life may surrender to him in reversion, or to him in remainder in fee*, and the estate for term of years is no impediment; for though this cannot give the possession of the land, yet it gives the possession of the franktenement, which is in the thing which was surrendered. Br. Surrender, pl. 55. cites 5 E. 4.

[124]

7. A surrender of a lease, void on non-payment according to covenant, is no surrender. Per Manwood, 2 Le. 143. pl. 178. 33 Eliz. in the Exchequer, in Sir Moyle Finch's case.

8. *Interesse termini* cannot be expressly surrendered. 10 Rep. 67. b. in case of the Church-wardens of St. Saviour's, Southwark, cites 37 H. 6. 16.

S. P. by Holt
Ch. J. Skin.
580. S. C.
—2 Salk.
565. S. C.
& P. by
Holt Ch. J.

9. An *estate at will of lands between common persons* is not a surrenderable estate; because it is at will of both parties, and either party may determine his will, without the formality of a surrender; and therefore there is no surrender at all in law of an estate at will between common persons. Per Holt Ch. J. 12 Mod. 79. Trin. 7 W. & M. in case of the King v. Kemp.

Cumb. 334.
S. C. —
2 Salk. 565.
S. C. There
ought to be
the will of
the king de-
clared under
the great seal,
that he ac-
cepts his sur-
render; otherwise
he is finable, if
he surceases
to execute
his office

10. But when the king grants an office at will, that is not at the will of both parties; it is only at the will of the king to determine the interest in the office that grantee holds of the king, without any surrender; for if it be an *office of trust for the profit of the king*, he is punishable by fine for refusal of it, and of that he cannot *divest himself without an actual surrender*, though it need not be proved. So it was done by 2 chief justices, Hale and Pemberton, who had an estate at will in their offices, and made an actual formal surrender by deed enrolled in Chancery. And if the king determines his pleasure, it must be by writ of discharge under the great seal, or by constituting a new person. 12 Mod. 79. Trin. 7 W. & M. in case of the King v. Kemp.

without such a discharge; and it was so done in the case of Hide and Hale, Chief Justices, who actually surrendered their offices of chief justice, and had a discharge under the great seal. Per Holt, Skin. 581. in case of the King v. Kemp. — 2 Salk. 466. pl. 2. S. C. & P. per Cur.

See (A) (B).

(B. 2) To whom.

So if two
men are

1. IF two are seised, and lease for term of years, and after the tenant surrenders to the one; this is a good surrender, and

and thereby both may enter. Br. Surrender, pl. 54. cites 26 *scised, and*
E. 3. 16. *lease for life,*
and the re-

nant for life surrenders to the one, this is good to both, and the other may enter. Br. Surrender, pl. 39. cites 5 E. 4. 4. — S. P. But Brooke says, it seems to him that he may grant his estate to the one, and the other cannot enter. Br. Reservation, pl. 48. cites 5 E. 4. 4. — S. P. Perk. f. 615. *But if the lessee for life has surrendered the lands unto both the lessors, or to one of them for 20 years, the same shall not take effect by way of surrender; for then there remains an interest in the lessee, which is as a mean remainder between the estate which is surrendered, and their reversion, &c.* Perk. f. 615.

2. *Particular estates, as for life, or for years, may be surrendered to him who has the immediate remainder or reversion to the particular estate in his own right; if the estate in remainder or in reversion be such an estate, wherein the particular estate may be drowned, unless he who surrenders had a joint estate in the freehold, or in the term for years, with him to whom the surrender is made; and in other special cases, &c.* Perk. f. 584.

If a man does enfeof J. S. and T. K. of certain land, to have and to hold to them, and to the heirs of T. K. and J. S. surrenders his estate unto T. K. it is a void surrender; notwithstanding that J. S. had that freehold, and T. K. had a fee expectant to be executed in possession, immediately after the death of J. S. And the reason is, because that T. K. had a joint possession in the freehold with J. S. and every joint tenant is seised of the whole; so that the surrender cannot be the cause that he has the possession of any part of the land; and also his estate cannot drown in the estate of T. K. for either of them has an estate of freehold in possession, in and through the whole land. Perk. 586. cites 12 H. 6. Sur. 6.

3. It has been holden, that an estate in fee of lands or tenements may be surrendered by the tenant unto his lord, who has cause to have an action of cessavit of the same land. Quære. [125] Perk. f. 585. cites H. 13 H. 4. f. 10.

4. *If donee in tail of a rent, &c. surrenders his estate to his donor who has the reversion of the same land in fee, it is a void surrender.* Perk. f. 590. cites 12 H. 7. 11.

5. If J. S. makes a lease for life of land to A. the remainder of the same land to B. for years, and A. surrenders his estate to B. it cannot take effect as a surrender; because an estate for life cannot drown in an estate for years. Perk. f. 589.

6. One termor cannot surrender to another termor; per tot. Cro. E. 173. Cur. Le. 303. pl. 420. Trin. 30 Eliz. C. B. in case of Pory v. Allen. S. C. — Ow. 97. S. C.

7. *Lessee for 20 years makes a lease for 10 years. The 2d lessee cannot surrender to the first; for 10 years cannot be drowned in 20.* Cro. E. 173. Hill. 32 Eliz. in case of Porey v. Allen. Per Gawdy J. it is good to convey his interest, but not to drown

the estate. Cro. E. 302. Trin. 35 Eliz. B. R. in case of Hughes v. Robotham.

8. A surrender of a lease cannot be but to him that has the immediate reversion, as an under-lessee for part of the term cannot surrender to the first lessor. Arg. Vent. 359. Hill. 33 & 34 Car. 2. B. R. in case of Moor v. Pitt. Ow. 97. Perrin v. Allen, S. P.

(C) What Thing or Estate they may [surrender]. See (A) (B) — Grant (M) (N).

[1. LESSEE for years leases to lessor part of his land, he may surrender the residue, for it is reversion. 20 E. 4. 13.] [2. One

So of joint-
tenant of
franktене-
ment, or of
a lease for
years. See Perk. pl. 584.

[2. *One jointenant in fee* cannot surrender to his companion. 40 E. 3. 41. Curia admitted contra. (But it seems that the book shall be intended, that it shall *enure as release*.)]

[3. *A devisee of land till a certain sum be levied* may surrender it, yet he has not any estate, but only a chattel, scilicet, the perception of the profits. 4 Rep. 82. b. Sir Andrew Corbet's case.]

S. P. and C.
cited by
Ventris J.
2 Vent. 328. in case of Dighton v. Greenvill.

[4. *Tenant by statute merchant, staple, and elegit*, may surrender. 4 Rep. 82. b. Sir Andrew Corbet's case.]

S. P. for
nothing is in
him in pos-
session till
Michaelmas,

[5. *A lease for years to commence at Michaelmas*, cannot be surrendered *before Michaelmas*. 22 E. 4. 37. 4 H. 7. 10. b. Perkins, f. 601. D. 35 H. 8. 58. Contra, 37 H. 6. 18.]

nor the lessor has not reversion before, but is possessed of the demesne; but grant of it before Michaelmas is good. Contra of release made by the lessor to the lessee before Michaelmas. Br. Surrender, pl. 43. cites 20 E. 4. 13. Per Brian and Nele J. — S. P. Perk. f. 601. — S. P. Br. Surrender, pl. 38. cites 4 H. 7. 10. per Keble and Rede. — S. P. Co. Litt. 338. a. But though in such case a surrender in deed is not good before Michaelmas, yet if before Michaelmas he takes a new lease for years, either to begin presently or at Michaelmas; this is a surrender in law of the former lease. — S. P. By Coke Ch. J. 6 Rep. 69. b. in Sir Moyle Finch's case, and cites 37 H. 6. 17. b. 18. a. — S. P. 10 Rep. 67. b. in the case of the Churchwardens of Saint Saviour's, Southwark, cites 37 H. 6. 16.

Debt upon a lease for years made at Lammas, to commence at Michaelmas next, to endure for 20 years rendering rent, the rent was arrear, and the lessor brought debt, the defendant pleaded another lease the next day to commence at the same Michaelmas for such a number of years upon condition broken of the part of the plaintiff; and so the second lease void, and a surrender of the first; and so both leases void. And per Moile and Davers, it is no surrender, because it was made before that the first lease commenced; but if the second lease had been after the first lease commenced, this had been a surrender; * but per Prisot, all is one; but 22 E. 4. 37. contra per Prisot; for a surrender gives possession, which cannot be before the first lease commenced, and he granted that release is not good before Michaelmas, nor the lessee shall not have trespass or ejectione firmæ before it. Br. Surrender, pl. 21. cites 37 H. 6. 17.

* [126]

[6. A man leases for years, lessee cannot surrender before entry. Contra, 22 E. 4. 37.]

[7. But in such case, if lessor waives the possession, the lessee may surrender before entry. Perkins, f. 603.]

Br. Surrender, pl. 42.

[8. If lessee for years leases to the lessor part of his term, and after surrenders the reversion of it, the rent is gone. 20 E. 4. 13.]

Fol. 495.

cites 14 E. 4. 6. per Brian.

[9. If there be lessee for years rendering rent, and lessor grants the rent to another, and after accepts surrender of the lessee, yet the rent continues to the grantee. 20 E. 4. 13. b.]

S. P. Br. Customs, pl. 2. cites 3 H. 6. 45. where it is admitted a good custom to surrender the franktenement. — Though it be incident to the estate of a copyhold to pass by surrender, yet so forcible is custom, that by it a freehold may pass by surrender. Co. Litt. 60.

10. In divers places there is a custom, that the *franktenant* who is *seised in fee*, when he will alien, shall come into the court and surrender the land. Br. Customs, pl. 17. cites 14 H. 4. 1. per Hank J.

As where a man grants rent to another for term of life out of his land, the grantee may surrender, and yet the grantor has no reversion of the rent. Br. Surrender, pl. 16. cites 14 H. 7. 2.

11. A surrender is good of a thing of which there is no reversion. Per Coningsby. Br. Surrender, pl. 16. cites 14 H. 7. 2.

the rent. Br. Surrender, pl. 16. cites 14 H. 7. 2.

12. A right cannot be surrendered. Co. Litt. 338. a.

S. P. 2 Mod.
288. Arg. in

Case of Moor v. Pitt. — Right nor condition cannot be given or determined by surrender, but by release. Cro. J. 36. Trin. 2 Jac. B. R. *Hull v. Sharbrook*; and cites 4 Rep. 25. b. *Kite v. Quinton*.

13. Though a future interest cannot properly be surrendered, yet it may be merged. Arg. 2 Roll. R. 171. in the case of *Price v. Butts*, cites 37 H. 6. 21 H. 4.

14. Dignity of peerage cannot be surrendered. Show. Parl. Cases, 1. *The King v. Lord Purbeck*.

(D) At what Place.

See (B) pl. 5.

[1. LESSEE for life of land in one county, may surrender in another county. 40 E. 3. 43.]

Br. Surrender, pl. 2.
cites S. C.

per Belk. Quod nemo negavit. — S. P. Br. Surrender, pl. 8. cites 11 H. 4. 61. per Cur.

2. In formedon, or other præcipe quod reddat, the tenant cannot surrender in pais. Br. Surrender, pl. 9. cites 12 H. 4. 21.

Br. Confession, pl. 15.
cites S. C.

(E) At what Time they may [surrender.]

[127]

See (C) pl.
5, 6, 7.

[1. IF A. leases to B. land for years, and afterwards before B. enters, or A. waives the possession, B. surrenders to A. this is a void surrender, inasmuch as he has not any actual estate till entry or waiver of the possession by lessor.]

Perk. f. 602.
S. P. says,
it seems to
be a void
surrender, if
any other

person be in possession of the thing leased at the time of the surrender, unless he has parcel of the term of the lessee by force of the grant of the lessee, &c.

If a man seised of land leases the same for 10 years to begin presently, and the lessor waives the possession, and before any entry made into the same land by any person, the lessee surrenders his estate unto his lessor, it is a good surrender, and yet the lessee shall not have an action of trespass for a trespass done upon the land before his entry; and also a release made unto him by his lessor is void before his entry, &c. Perk. f. 603.

[2. If A. leases land to B. for years, and B. enters, and after B. assigns it to C., C. may surrender to A. before any entry made by him or waiver of the possession by B. because this was an actual estate in B. severed from the reversion by the entry of B. and C. has an actual estate by the assignment made to him before entry, B. not being any ejector. P. 11 Car. B. R. per Cur. adjudged upon a special demurrer between PRANCE AND TITLEY. *Intratus*, 1111. 11 Car. Rot. 70. But judgment was e contra upon another point.]

3. If there be lessee for 10 years of land, and he grants parcel of the years unto a stranger, and the grantee enters, &c. and the lessee surrenders to his lessor, it is a good surrender; but if the grantee of the lessee had surrendered to the lessor of his grantor before the surrender made by the lessee, the same shall not take effect as a surrender. *Causa Patet*, Perk. f. 604. cites 14 H. 7. 3.

See Release
(G) pl. 12.

4. If two *jointenants of a next avoidance* are, the one of them cannot surrender to the other *after the avoidance* happens. D. 283. Marg. pl. 29. cites P. 31 Eliz. Brockbie's case.

5. If I make a *lease to I. S. for so many years as I. K. shall name*, I. S. may not surrender his term before that I. K. names the years; per Popham. Goldsb. 168. pl. 98. Hill. 43 Eliz. in case of Hoo v. Marshal.

6. *Bargainee before entry* may surrender, assign, or release. Cart. 66. per Bridgman Ch. J. for he has actual possession.

(F) By Acceptance of Lessee for Years [&c.]

And. 51. pl.
126. Lan-
caster v.
Aller, S. C.
that the
feoffment
was good.—

[1.] If *lessee for life* accepts by *parol a feoffment in fee* of the land, and *livery* upon the land from him in reversion or remainder, this is a surrender and afterwards a feoffment. D. 19. El. 351. 48. 40 E. 3. 24. 37 H. 6. 18. per Prisot.]

Bendl. 288. pl. 288. Langastell v. Aller, S. C. and the special verdict.

If *lessee for years* the remainder for life are, and he in reversion in

[2. If *lessee for years* agrees that his *lessor shall make a feoffment* to a stranger, it seems that this is a surrender; for it cannot be intended but that he intended that the feoffee should have the land in demesne. Dubitatur, D. 29 H. 8. 33. 14.]

fee makes feoffment and livery to lessee for years, though this acceptance of the feoffment cannot enure as a surrender because of the estate for life in remainder, yet it shall enure as a grant of his estate for the time to the feoffor, or at least a licence to him to make livery, and so a good feoffment. P. 40 El. * B. R. between Eedes and Knotsford; but Mich. 40 & 41 El. B. R. this was adjudged to the contrary. See Feoffment (L) pl. 8. and see Ow. 66. Trin. 41 Eliz. B. R. Knotts v. Everstead.

* [128]

If lessor by assent of lessee for life, and in his presence makes livery, this as-

[3. If a *lessee gives licence to the lessor to make a feoffment* of the land to a stranger, this is not any surrender, but only a grant of his term for a little time, for the licence shews that he does not intend to pass his estate. D. 29 H. 8. 33. 14. 5. per Fitzherbert, said it was so held in 5 H. 7.]

sent will make a lease at will, or a surrender for the time, and so the livery good. 2 Roll. Feoffment (L), pl. 17. cites 40 El. per Cur. between Shepherd and Gray.

[4. So if *lessee licenses the lessor to make livery*, a fortiori this is not any surrender. Tr. 4 Ja. B. R. per Cur. in the case of Sible v. Searle.]

S. P. agreed
And. 247.
Mich. 31
& 32 Eliz.
in case of

[5. So if *lessee for years makes livery as attorney to the lessor*, this is not any surrender. Tr. 5 Ja. B. R. per Cur. in the case of Sible v. Searle.]

Batty, alias Petty, v. Trevillian.—S. P. for he does not make the livery in his own right, but as a servant or minister to the lessor, and by his authority; and when the lessor made a feoffment, he gave nothing but what he might rightfully pass, which is only the reversion that is in him, and the livery of the lessee gives nothing to the feoffee but only a means to pass what the lessor might lawfully pass; as if the tenant makes feoffment of his tenancy and the lord as attorney makes livery, this does not extinguish his seignory; for he does nothing but by authority given. Mo. 11. pl. 41. Hill. 4 E. 6. Anon.

So if *lessee for life delivers seisin upon a letter of attorney*, this is no surrender; per Periam. D. 33. b. Marg. pl. 13. & 14. cites Mich. 31 & 32 Eliz. C. B. Trevillian's case.

[6. The

[6. The acceptance of a voidable lease will be a surrender of a (G) pl. 11. good and sure lease. D. 3 & 4 Ma. 140, 43.] S.C. — A

woman sole
takes a consideration for making a lease for 21 years and then marries, and she and her husband made the promised lease. Before the 21 years end the *hiffce* surrenders and takes a new lease for 21 years more; the husband dies; the wife ousts the lessee, who sues in Chancery to have the first lease continued for the remainder of the first 21 years, and not remedied here, the surrender being voluntary. Cary's Rep. 29. cites 44 Eliz. Anon.

A. and M. his wife were tenants for life, afterward the lessor by indenture betwixt him and A. and M. and B, their son, dated 30 July, 21 Eliz. leased it to A. M. and B. *habendum a die datus* indentures for their lives, and made livery 23 Eliz. *secundum formam chartæ*, and it was resolved by all the Court that the 2d lease was void; for as much as it is *habendum a die datus*, and the livery made so long time after it will not help it; but yet they held, that it was a surrender of the first lease, for the acceptance of the indenture in the contracting, and agreement to have a new lease, made a surrender of the first lease; and it was adjudged accordingly. Cro. E. 873, 874. pl. 12. Hill. 44 Eliz. in C. B. Mel-lows v. May. — Mo. 636. pl. 876. S. C. resolved that the taking the second lease was a sur-render of the estate of the feme being covert during the coverture only.

Acceptance of a void lease is not a surrender of a good lease. Hytt. 105. in case of Watt v. Mayd-well, cited per Cur. as the case of Baker v. Willoughby.

[7. If a lessee for years of a dean and chapter made before the sta- Je. 405, tute of 13 Eliz. after the statute accepts a new lease for the residue of Pl. 2. Trin. 14 Car. the term by force of the proviso of the statute of 13 Eliz. but this B. R. new lease is not good within the proviso but merely void; this shall Lloyd v. Gregory. S. C. ac- cordingly. — Cro. C. 502, pl. 2. S. C. but this among other things found specially.]

but the diversity of void and voidable leases does not appear there.

[8. If feme lessee for years takes *baron*, who after accepts a new D. 177, b. lease for their lives, this is a surrender of the first lease, Pl. C, pl. 35. Hill. 2 Eliz. S. C. 199. per Curiam, Wrottesly v. Adams.] — If a

feme lessee
for years marries, and then takes a new lease for life, this extinguishes the term; but if *husband dis-* agrees, then it is revived; but if the new lease had been made to the husband and wife, then it had been questionable, for the estate passed by implication, viz. by a surrender in law by the accepting a new lease; per Hobart Ch. J. Hytt. 7, 8. Trin. 14 Jac. in case of Swaine v. Holman. — Hob. 179. pl. 212. * Swain v. Hollam S. C. but S. P. does not appear. — Ibid. 203. pl. 257. S. C. Ho-bart Ch. J. says, if the second lease had been made to the husband and wife both, as it was but to her alone, yet upon his death she might have claimed again by her old term. — Ibid. 226. S. C. cited by Hobart in case of Anne Needler v. the Bishop of Winchester, that the estate was not totally surren-dered as to the feme. * [129]

[9. If lessee for years accepts a new lease to commence presently, this is a surrender; for by this he admits the lessor to have suffi- If a man leases land and after makes ano-ther lease to the same les- sive of the same land, the acceptance of the second lease is a surrender of the first lease, per Brudnell Ch. J. and Brooke J. which none of the other justices denied, quod nota; and it is not expressed there if the second lease was for more years than the first or not; quod nota. Br. Surrender, pl. 14. cites 14 E. 8. 15. out a surrender. † 37 H. 6. 18.]

† S. C. cited 6 Rep. 69. b. in Sir Moyle Finch's case.

[10. So though the 2d lease be for fewer years than the first. D. 3 If A. lease to B. for 100 years, & 4 Ma. 140. [b.] 43. [Whitley v. Gough.]

and then grants the reversion to C. for two years, and C. leases to B. for two years, and B. accepts the lease for two years, this is no surrender; for a term of 100 years cannot be drowned in a reversion for two years, and yet the first lease is determined; per Anderson, which Periam granted, Le. 322, 323. pl. 454. Hill. 31 Eliz. C. B. in case of Willis v. Whitewood.

This is a surrender of the first lease, and is as if the first lessee had taken a new lease for 2 years of his lessor. Cro. E. 302. pl. 1. Trin. 35 Eliz. B. R. in case of Hughes v. Robotham.

And where a lease is by parol, and after is made by indenture, Brooke makes a quære if this be not a surrender. Br. Reservation, pl. 17. cites 21 H. 7. 37.

[11. If lessee for years by indenture accepts a lease for years by parol; this is a surrender of the first lease. D. 3 & 4 Ma. 140. 43. [Whitley v. Gough.]

* Cro. E. 605. pl. 3. Hutchins v. Martin, S. C. accordingly; and the lessor may enter in the interim, and take the profits. — † Cro. E. 521. pl. 49. Mich. 38 & 39 Eliz. C. B. Ives v. Sammes, S. C. accordingly. — 2 And. 51. pl. 38. S. C. accordingly. — S. C. cited per Cur. Hutt. 105. in case of Watts v. Maydwell.

[12. If lessee for years accepts a future lease to commence within the first term, this is a surrender immediately. * P. 40 El. B. R. between MAJON AND HUTCHINS. 5 Rep. 11. b. † IVE's case resolved, because he by his acceptance has affirmed the lessor to have ability to make the lease, the which he cannot do without surrender, and there cannot be a *fraction of the estate*, scil. to be a surrender for part of the years.]

Prior and convent of N. made a lease to B. for 24 years; and about 2 years after made a lease to C. for 99 years, to commence at a day before. About 4 years after the lease to C. the prior and convent were translated into a dean and chapter, and their possessions confirmed, and they then made a new lease to C. for 99 years, to commence at a day before. The lease of 24 years was still in being. Within a year after, the statute of 31 H. 8. of dissolutions was made. Afterwards in 2 E. 6. they surrendered their possessions, and a new corporation was established, reserving to the king the land in lease, which he granted to W. in fee. The question was, if W. might enter and avoid the 2 leases of C. or either of them? And the Court, prima facie, thought he might; and that the first 99 years lease was drowned, and surrendered in law by the taking the 2d, though he had no possession of the land at that time, according to 37 H. 6. 4. and that the 2d lease was void by statute 31 H. 8. it being made within a year before the act, and the first lease being in esse, &c. tamen Curia advisare vult. D. 279. b. 280. a. Mich. 10 & 11 Eliz. Corbet's case als. the Prior and Convent of Norwich's case. — See 2 Rep. 49. a. in the Archbishop of Canterbury's case, Trin. 38 Eliz. B. R. where this case is said to be denied by Popham Ch. J. and some other justices [But, as it seems, this was with respect to the avoiding the leases of colleges, deans, and chapters, &c. by the statute of 31 H. 8.]

If a lease be made to begin at Michaelmas, and before that time the lessor makes a new lease to the same lessee to commence presently, the same is not any surrender, and yet thereby the same is determined. Per Windham, which Anderson granted, but Periam doubted. Le. 323. pl. 354. Hill. 31 Eliz. C. B. in case of Willis v. Whitewood.

It shall be construed as a lease of the rest of his land in D. Cro. J. 177. Gibson v. Searle, S. C.

[14. If lessee for years [of part] accepts a lease from the lessor of all his land in D. (where the land lies) yet this is not any † surrender; for peradventure he intended other land. Tr. 5 Jac. B. R. per Curiam, in Sible and Searl's case.]

† [130]

And because he may have the benefit of it after the lease is determined.

[15. If lessee for years accepts a grant of a rent of him in reversion, payable at such feasts, without limiting when it shall commence; this is not a surrender, because § it does not appear that they intend that it shall issue out of the reversion. Tr. 5 Ja. B. R. per Curiam, in Sible and Searle's case.]

Cro. J. 177. in case of Gibson v. Searle. — If lessee for life takes a grant of a rent-charge out of the same land for life, it is a surrender, according to 21 H. 7. 6. For otherwise the rent-charge cannot take effect; but if such lessee for life takes it for years, it is no surrender. Cro. J. 177. in case of Gibson v. Searl. — If the rent-charge is to commence presently, it is an immediate surrender of the estate for life. Cro. E. 874. Hill. 44 Eliz. C. B. in case of Mellow v. May. — S. P. Mo. 637. pl. 876. In case of Mellow v. May.

[16. But if the rent be granted to commence at a certain time within the term, this is a surrender. Tr. 5 Ja. B. R. in Sible and Searle's case; per Curiam. 27 H. 7. 5.]

[17. If lessee for years of land accepts a new lease of *vestura terre*; this is a surrender. Tr. 5 Ja. B. R. per Curiam, in case of Sible v. Searle.]

So of herbage, because it cannot

confist with the lease. Cro. J. 177. in case of Gibson v. Searle.

[18. So if lessee accepts a grant of a common out of the same land; this is a surrender. Tr. 5 Ja. B. R. per Cur. in case of Sible v. Searle.]

Because inconsistent with the

lease. Cro. J. 177. in S. C.

[19. If lessee for 21 years of a manor accepts a grant of the office of the bailiwick of the manor for the 21 years; this is not any surrender of the first lease, because this office is not any interest in the thing leased, but only an authority; and peradventure it was intended that he should be baili of the reversion, to pay the rent due by himself to the lessor. Tr. 5 Ja. B. R. adjudged between Sible and Searle.]

S. P. debated Cro. J. 84. Gibson v. Searles.—Adjudged no surrender. Cro. J. 176. pl. 16. Trin. 5 Jac. B. R. S. C.

Lessee for years of a manor takes a lease of the bailiwick of the manor; this is no surrender of his term, because it is of a thing which is collateral. Godb. 153. Gage v. Peacock. — Noy, 12. S. C.

The bailiff of Westminster is commonly a great man, who hath also leases in Westminster of the demise of the dean and chapter, and yet it was never intended to be any surrender. Cro. J. 177. in the case of Gibson v. Searle.

[20. So the acceptance by lessee for years of a manor of the stewardship of the manor, is not any surrender for the cause aforesaid. Tr. 5 Ja. B. R. cited to be adjudged.]

Cro. J. 177. cites it to have been so adjudged

in the case of Sir Valentine Brown.

[21. So if lessee for years of a park, accepts a grant of the keepership of the park, this is * not any surrender, because a keeper has no interest in the park. Tr. 5 Ja. B. R. cited to be one SIR JOHN CHAMBERLAIN's case, for Prestbury Park in Gloucestershire.]

* S. P. Because it is an office collateral to the land. Cro. J. 177. in case of Gibson v. Searle.

son v. Searle, cites S. C. — King H. 8. granted the custody of the park of O. with reasonable herbage, to G. and also the manor of O. cum pertinentiis, and 100 load of wood (excepting the park, the deer, and the wood) for 50 years, if the grantee should so long live. G. surrendered the letters patents in Chancery to be cancelled, (and so they were,) to the intent the king might grant a new lease to P. and accordingly a new lease was granted to P. of the manor of O. as it was before granted to G. And afterwards anno 5 & 6 Ph. & Mar. the office of keeper of the park was granted to the same P. without the proviso of his living 50 years, or saving reasonable herbage. The reporter concludes with a nota, † that he heard Sir H. Yelverton say the judges were of opinion, that he had but the custody of the park, and no interest in it; for that by the acceptance of the custody of the park, when he had a lease of it before, it was a surrender of his lease. Godb. 413, 414. 425. pl. 491. Trin. 21 Jac. B. R. Lord Zouch v. Moore.

† [131]

22. A prioress leases to T. for term of life, who takes feme, and after the prioress comes to T. and T. says to her that his will is that she enter into the land, by which she enters; this is a good surrender; quod nota; and then she leased again to him and his feme. Br. Surrender, pl. 1. cites 40 E. 3. 24.

23. If tenant for life surrenders to him in reversion out of the land, to which he agrees, the franktenement by this is in him immediately,

ly, and he is tenant to bring action by præcipe quod reddat without entry, but he shall not have trespass without entry. Br. Surrender, pl. 50. cites 21 H. 7. 7.

But if lessee for years of the king takes a 2d lease for

24. If lessee for 10 years of land takes a new lease of the same lands of his lessor for 20 years, it is a surrender of the first lease, &c. Perk. f. 617.

more years of the same land of the king, this second lease is thereby void; and therefore an acceptance of it shall not cause a surrender of the other lease. Agreed by the barons; and they said it was so held in HARRIS AND WING's case. Lane, 22. the case of Saint Saviour's in Southwark.

So it is if a man make a lease for 40 years, and the lessor grants the reversion to the lessee upon condition,

25. If a man make a lease for 40 years, and the lessee afterwards takes a lease for 20 years upon condition, that if he does such an act, that then the lease for 20 years shall be void; and after the lessee breaks the condition, by force whereof the 2d lease is void, notwithstanding the lease for 40 years is surrendered; for the condition is annexed to the lease for 20 years, but the surrender was absolute. 2 Inst. 218. b.

and after the condition is broken the term was absolutely surrendered. 2 Inst. 218. b.

And the diversity is when the lessor grants the reversion to the lessee upon condition; and when the lessor grants or surrenders his estate to the lessor; for a condition annexed to a surrender may revert the particular estate, because the surrender is conditional. But when the lessor grants the reversion to the lessee upon condition, there the condition is annexed to the reversion, and the surrender absolute. 2 Inst. 218. b.

26. Lease for years to A. Afterwards a lease is granted to B. to commence at the end of the lease to A. A. takes a new lease. This is a surrender of his other lease, and B. may enter. Pl. C. 198. b. Wrotesley v. Adams.

By 4 against 2, it is a surrender. Ibid. Marg. S. C. — Adjudged, that it is a surrender.

27. Lessee for years of a house, accepts the office of the custody of the same house for life, with a fee for exercise of the said office. If this be a surrender? No judgment was given, but the matter was left to the determination of some of the privy council, &c. D. 200. b. pl. 62. Pasch. 3 Eliz. Earl of Arundel v. Lord Grey.

Ibid. in Marg. cites 3 Jac. Gibbs v. Searles. — S. P. cited as adjudged a surrender; for it is another interest, and cannot stand with the first lease. Cro. J. 177. in case of Gibson v. Searl.

28. A. tenant for life, remainder to B. in tail, B. levies a fine, with proclamations sur concessit, to A. and C. for their lives. This fine bars the entail during the said 2 lives only, and is not a discontinuance omnino; for B. was seised by force of the tail, and the fine is sur concessit. It seems that A.'s acceptance of this estate to him and C. is a surrender of the former estate which he had; as in case of a lease for years made to A. and during the years he accepts a lease for years of the same land to him and B. Jenk. 321. pl. 28.

Mo. 358. pl. 437. Carter v. Love. S. S. accordingly.

29. Lessee for years devised his term to J. S. and made his wife executrix, and died. The widow entered, and proved the will, and married again; and this 2d husband takes a lease from the lessor. J. S. entered, and grants all his estate to the husband and wife. The

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opinion of the Court was clearly, without argument, that by this acceptance of the new lease by the husband, the term, which the feme had to another use, viz. to the use of the testator, shall

shall be deemed a surrender. Owen, 56. Trin. 27 Eliz. Carter v. Lowe.

30. Lessee for 21 years took a lease of the same lands for 40 years, so begin immediately after the death of J. S. This is no present surrender of the first term; but if J. S. die within the term, then it is a surrender; for it may be J. S. may survive the first term. 4 Le. 30. pl. 83. Pasch. 30 Eliz. in B. R. Anon.

31. A. lessee for 30 years leases for 19 to B.—A. agreed with C. by articles in writing, that B. should have a lease for 3 years more in the same and other lands, and that it should not be a surrender of his other lease. B. afterwards agreed to the articles. Per Cur. this is no surrender. Le. 303. pl. 420. Trin. 30 Eliz. C. B. Pory v. Allen.

Ow. 97.
S. C. by
name of
Peryn v.
Allen.—
Cro. E. 173.
S. C. but
somewhat
differently

stated; and there adjudged, that words and acts between strangers can make no surrender, as an agreement between A. and B. that C. shall hold for 3 years lands of which C. had a lease for 17 years, and other lands at a greater rent, cannot make an after-agreement of C. to be a surrender of his term for 17 years.

32. Tenant in socage leased his land for 8 years, and died, his heir within the age of 8 years. The mother being guardian in socage, leased by indenture to the same lessee for 14 years. Per Cur. the first lease is surrendered; but otherwise on a lease made by guardian by nurture. Le. 158. pl. 226. Mich. 31 Eliz. C. B. Anon.

4 Le. 161.
pl. 267.
S. C. in to-
tidem ver-
bis.—
Le. 322. pl.
454. S. C.
by the name
of Willis v.

Whitewood; and Anderson said, that surrendered it cannot be; for the guardian has not any reversion capable of a surrender, but only an authority given to her by the law to take the profits to the use of the heir; but yet perhaps it is determined by consequence and operation of law.—Ow. 45. S. C. accordingly, by Anderson.—4 Le. 7. pl. 31. S. C. by name of Willet v. Wilkinson, says, it was adjudged that this was a surrender of the first lease; and says, note, the 2d lease was made in the name of the guardian.—S. C. cited Arg. in case of Watts v. Maidwell, by the name of Mills v. Whitewood; and that it was adjudged no surrender. Hutt. 105. —Litt. Rep. 282. Arg. in case of Maydwell v. Watts, cites S. C. by name of Wills v. Whitewould, and that it was adjudged no surrender, because guardian in socage cannot take a surrender, for he has no reversion.

33. Magdalen-College in Oxford, 20 Dec. 8 Eliz. leased a messuage to W. S. for 20 years from Mich. next. And after, on the 25 October, 21 Eliz. they did lease the same messuage to W. S. the same person, for 20 years from Mich. next. Afterwards, on the 31 August, the 30 Eliz. they leased to J. N. for 20 years. The acceptance of the 2d lease by W. S. is a surrender of the first, and is so immediately on the acceptance, and not good to the Michaelmas following; and so the 2d lease is but a lease to begin in futuro. Poph. 9. Hill. 35 Eliz. Thomson v. Trafford.

2 Le. 188.
pl. 286.
Trin. 32
Eliz. S. C.
adjornatur.

34. A. made a lease by deed to B. 14 December, 14 Jac. [which was in 1617.] to commence at Lady-day 1619, for 41 years. Afterwards, upon the 3 December, 15 Jac. [which was 1618.] A. leased the same land to C. for 99 years, to commence † presently. Afterwards 14 * Jan. 16 Jac. [which was Jan. 1619] A. made another lease to B. for 41 years of the same land, to commence 17 November 1619. All which leases were by indenture. The sole question was, Whether the taking of the 2d lease of the same land by B. the first lessee, be a surrender? It was resolved, that the first lease was not surrendered or determined; that the 2 terms which C. took can never meet or clash together, and consequently it

* Hutt.
104, 105.
S. C. instead
of Jan.
mentions
the 2d lease
to B. to be
dated the 14
Nov. 16
Jac. to com-
mence from
17 Nov.
1619; and
that B. ac-
cepted it,

and afterwards entered.—

† Hutt. says, that the lease

cannot be a surrender; and judgment was given accordingly. Litt. Rep. 268. Pasch. 5 Car. & 279. Trin. 5 Car. C. B. Watts v. Maydwell.

to C. was to commence from the Annunciation last; and that C. entered, and was thereof possessed, and that afterwards (ut supra) A. made the said 2d lease to B. — Hutt. 105. says, it was adjudged for the plaintiff, because by the lease made to C. for 99 years, and her entry, A. had but a *reversion, and could not by his contract made afterwards with B. give any interest to B. This lease made to B. viz. his former lease, was good in interest, being to commence at a day to come, and is grantable over, and may be surrendered or determined, by matter in law before the commencement thereof, as if he take a new lease to commence presently, which see in 17 H. 6. 29. 22 E. 4. for it inures in contract. And in this case it had been without question, that the taking of the new lease had been a surrender of the former if it were not, by reason of the lease for 99 years, which is for so great a number of years, that disables him to contract for 41 years.

* [133]

S. C. cited Vent. 297.

but there it is mentioned that if an officer for

life accepts of a new grant it is no surrender of his former grant without mentioning the 2d grant being to him and another. — But where two were joint officers for life, and to the survivor, and they surrendered in order that a new grant might be made to one of them and a stranger, the acceptance of the new grant by that one would be a surrender. Vent. 297. Trin. 28 Car. 2. B. R. Woodward v. Aston. — 2 Mod. 95. S. C. accordingly.

Ibid. it is said [which seems to be an addition, or remark of the reporter] viz. and it seems not reasonable that a lease in trust, which is in another person, and made in majorem cautelam, should be a surrender.

35. Where an officer for life accepts of another grant of the same office to him and another, it is not any surrender of the first grant. Resolved. Cro. C. 259. Trin. 8 Car. B. R. Walker v. Sir John Lamb.

36. A. was lessee of H. 8. by patent for 21 years, the reversion to B. Afterwards B. by deed reciting the lands, but mis-reciting the dates of the several letters patents, grants all the lands to the said A. for 21 years after the expiration hujusmodi literarum patentium. This acceptance of the 2d lease seems to be a surrender of the first, the commencement being referred to the expiration of the said letters patents, and not of the term, and so the 2d lease shall commence immediately. See Grants, (Q), pl. 6. But see Prerogative, (Q. b. 2), pl. 4. and the notes.

37. Lessee for years of lands held of a prebendary for 99 years by a lease made in 4 E. 6. to commence after the expiration of former leases, employed some friends to take new leases of the succeeding prebendaries, in trust for him, who accordingly did so. The doubt was, Whether this was good evidence of the surrender of this old lease? and the Court inclined that it was. But the next day the jury found that it was no surrender. Sid. 75. pl. 6. Pasch. 14 Car. 2. B. R. on a trial at bar, Gie v. Rider.

So if he accepts a lease at will. Mo. 637. in case of Mellow v. May. —

Cro. E. 874. in case of Mellows v. May.

38. Lessee for life accepts a lease for years. This is a surrender of his estate for life; agreed. All. 59. Pasch. 24 Car. B. R. in case of Bernard v. Bonner.

39. Jointenants of a house join in a lease, to commence the next day. Afterwards, the same day, 2 of the 3 demise the same house to the same lessee for the same term, to commence from the same day. This is a surrender of the first lease, and a new lease of their 2 parts; and the old lease continues as to the 3d part of him that did not join

join in the 2d lease, and the lessee's entry and possession was by both leases, viz. of the 3d part by the first lease, and of the 2 parts of the 2 others by the 2d lease. 3 Lev. 117. Pasch. 34 Car. 2. in Cam. Scacc. Turbervill v. Stockton.

(G) *What Act or Thing shall be said a Surrender.*

[134]
See (f) pl.
2, 3, 4, 5.—
Remitter (E)

[1.] If there be *lessee for life*, the reversion to an infant, and the lessee makes feoffment in fee to him in reversion, this is a surrender. 39 E. 3. 29.]

[2. If tenant for life makes feoffment in fee to him in reversion, though he be of full age, yet this is a surrender. 39 E. 3. 29.]

Co. Litt.
42. a. S. P.
— Ibid.
252. a. S. P.

— Perk. pl. 616. S. P. And so if he infeoffs him in the remainder for life.

[3. But otherwise it is, if tenant for life infeoffs him in remainder in tail; for this divests the remainder, and so passes as a feoffment. 41 Aff. 2. adjudged.]

If tenant
for life in-
feoffs him in
remainder;
this is a sur-
render.

render; per Perley, Kirton and Clopton, in a scire facias; and yet Belk. awarded contra. Br. Surrender, pl. 7. cites 50 E. 3. 6.

[4. If lessee for life infeoffs baron and feme in reversion in right of the feme, this is a surrender (admitting that it is not a forfeiture). Dubitatur. 39 E. 3. 29. Contra, 39 Aff. pl. 7.]

[5. But if the lessee for life grants his estate to the baron and feme in reversion in right of the feme, this is not any surrender for the benefit of the baron. * 21 H. 7. 40. Curia, 14 H. 7. Rent revived. 2 Curia. Contra, 11 E. 2. Age, 144 adjudged.]

* Br. Sur-
render, pl.
23. cites
S. C.—
It shall
enure by

way of grant. Perk. f. 82.—Where a man leases land for life, and has issue two daughters, and dies, and the one takes baron, and the tenant grants to her and her baron all his estate, this is no surrender, per Vavisor clearly. Br. Summons and Severance, pl. 14. cites 21 H. 7. 40.—S. P. Perk. f. 623. cites 2 H. 7. 14.

[6. If lessee for life be the reversion to a baron in fee, and lessee leases the land to the baron for the life of the baron, and then the baron dies, and then the lessee dies; the wife shall not be endowed of this, because there was a possibility of reversion during the coverture, as to the franktenement (which proves that this was not any surrender). 1 E. 3. 16. per Tond.]

Fol. 497.
So where a
man leased
land for
term of life,
the remain-
der to W. in tail,

and the tenant for life leased it to him in remainder for term of life of him in remainder, who took feme and died, and the first lessee entered, and the feme was barred of dower; and so this is no surrender. Br. Surrender, pl. 49. cites 50 E. 3. 27. and Fitzh. Dower, 55.

So where A. was tenant for life, the remainder to W. in fee, and A. aliened to W. for the life of W.—W. died, and A. re-entered, and the feme of W. brought writ of dower, and was barred; for this alienation is no forfeiture nor surrender, because it was to him in the next remainder; quære legem inde. Br. Forfeiture de Terris, pl. 91. cites 13 R. 2. and Fitzh. Dower.

[7. If baron and feme seised in right of the feme for the life of the feme, lease by indenture to him in reversion for the life of the baron, this is not any surrender; for by this taking he affirms the reversion in him in reversion. 29 Aff. 64.]

[8. If

So of such lease to him in remainder. Br. Estates, pl. 67. cites H. 13 R. 2. — But if tenant for life aliens to him in reversion for term de antea vic, it is a good surrender. Br. Forfeiture de Terres, pl. 83. cites 24 E. 3. 68.

So if lessee for life of land leases the same land to him in the reversion for life, the remainder unto a stranger in fee, the same is no surrender; causa patet. Perk. f. 620.

[135]

If tenant for life leases the same lands to him in reversion, habendum to him during the life of the tenant for life rendering rent. Adjudged this is not good without livery of seisin; nor is this lease any surrender either in law or in deed, to him in the reversion. By all the Justices of C. B. Bendl. 152. pl. 211. Pasch. 8 Eliz. Brown v. Kinswell. — bid. 33. pl. 81. Browne v. Kingston, S. C. but states it of a lease made by tenant *per antea vic*; and that he made the lease to the reversioner, habendum to him during the life of the lessor rendering to him certain rent. And the justices were of opinion, that this is not good without livery, nor is it any surrender.

[10. So if lessee for life leases to the lessor for the life of the lessor and lessee, this is a surrender, because there is not any possibility of reversion. P. 16 Ja. in the Exchequer-chamber, upon an English bill, adjudged by all the barons, between the King and the Lord Dudley.]

(F) pl. 6. S. C. — This is the case of Whitley v. Gough. — A guardian in chivalry took a feoffment of the infant within age that was in ward, and the infant brought an assise, and the guardian shall be adjudged a disseisor; which proves that the feoffment, as against the infant, was void; and yet by acceptance thereof the interest of the guardian was surrendered. 2 Inst. 218. b.

Br. Surrender, pl. 32. cites S. C. accordingly. [12. If there are 2 coparceners, of whom one is within age, and in ward, and the other aliens to B. who purchases the ward of the land and body of the lord, and after at full age of the ward it is agreed between them, that partition shall be made; and upon this they put themselves in arbitrement, and the arbitrator awards a severance, and assigns their parts, to which the ward does not agree, yet this is a surrender, scil. the submission and award. 31 Aff. 26. adjudged.]

Roll. Rep. 387, 388. pl. 8. Trin. 24 Jac. Ba. con v. Waller. — (1) pl. 1. S. C. — But if lessee for life grants his estate to him who has the reversion in fee in his own right, and immediate to the particular estate, this shall enure by way of surrender. Perk. f. 82.

Roll. R. 387. Trin. 24 Jac. B. R. S. C. — 3 Bulst. 204. S. C. & S. P. by Coke Ch. J. accordingly; and said it is very clear he shall have it in several. — (1) pl. 2. S. C.

[14. As if lessee for 20 years grants all his estate to the lessor, except a month or a day at the end of the term, this is not any surrender, because the lessee has a reversion. My Reports, adjudged Bacon v. Waller.]

[15. If

[15. If *lessee for life grants all his estate to the lessor*, this is a surrender. 7 H. 6. 4. b.] But if *lessee for life grants his*

estate to lessor rendering rent, it is no surrender. Arg. 2 Roll. R. 474. cites Bendl. Rep. ——— This shall not enure as a surrender, because there wants words of surrender, but shall enure by way of grant only. 4 Ld. 237. cites it as adjudged 44 Eliz. in B. R.

[16. If *lessee for life leases to the lessor in reversion, and to the heirs of his body for the life of the lessee*, this is not any surrender; for peradventure there may be an heir of the body, who shall not be heir general, and the estates divided. 18 E. 3. 45. admitted.]

[17. If *tenant for life be contented and agreed with him in reversion, that he shall have the land and his interest for a certain annual rent, and that if tenant for life survive him in reversion, that he shall have the land again*; this is not any surrender clearly, because he shews that the lessor shall not have all his estate. D. 8. [136] Eliz. 251. 93.]

[18. So if the tenant for life be contented and agreed with him in reversion that he shall have the land and his interest for a certain annual rent; this agreement *being by parol* is not any surrender; for if it should be a surrender, then the reversion of the rent should be void, this being by parol, and his intent is apparent to have the rent. And therefore it seems that this is but a lease at will, *no livery being made*, and so the rent well reserved. D. 8 El. 251. 93. per Curiam. But the justices of assize contra.] It was agreed in the case of Brown and Kingswell that a lease for years may be determined by words implying a

renewment of lease, that the lessor should have the lands again: but it was there doubted if a *lease for life* may be so determined, and where in the principal case the lessee delivered the indenture containing the demise to a stranger to deliver *simul cum toto statu & interesse termini predicti* to the lessor, upon the lessor's agreement to pay to lessee 70l. And that superinde the stranger delivered, &c. accordingly, and the lessor accepted thereof, and plucked away the seal; and all this was found by the verdict, and further, that the *lessee was content*, and afterwards the lessor made a new lease; this is a good surrender as if it had been found that he had used such words. Cro. E. 487. pl. 4. Mich. 38 & 39 Eliz. B. R. Sleigh v. Bateman.

When *lessee for years agrees with lessor, and is content that the lessor shall have the land again*, it is a good surrender of a term for years, Cro. E. 448. Sleigh v. Bateman.

19. If a man *leases for years the remainder over for years, and after the first termor grants his interest to the lessor*, this is no surrender by reason of the mesne interest of the term in remainder. Br. Surrender, pl. 52. cites 31 H. 3. & lib. Perkins, tit. Surrender.

20. And if *termor makes his lessor his executor and dies*, this is no surrender; for he has it to another use; contra Whorwood. Br. Surrender, pl. 52. cites 31 H. 3. & lib. Perkins, tit. Surrender.

21. Where a man *leases for years rendering rent, and the lessee waives the possession for greatness of the rent, and takes away his goods, and the lessor enters*, his entry is not lawful; for this is no surrender. Br. Surrender, pl. 25. cites 8 Aff. 20. Br. Assize, pl. 136. cites S. C. If the lessee waives his possession, this

is no surrender by the opinion of the Court, unless the lessor agrees to it, and enters, & *quere inde* for the waiver does not express the intent of the lessee. Br. Surrender, pl. 45. cites 7 H. 6. 1.

22. *Tenant by the curtesy* was, the reversion to baron and feme; the tenant by the curtesy *infeoffed the baron and feme*. This was adjudged a surrender to the feme, and no feoffment; and so see that if the feme dies without issue, the heir of the feme may enter

ter upon the baron; quod nota. Br. Surrender, pl. 26. cites 11 Aff. 14.

If a man
seised of
land lease
the same
land for life
and grants
the remain-
der unto a
stranger for
life, and the
lessee for life

23. Formedon against *tenant for term of life*, the remainder to *W. for term of life*, and this same *tenant for term of life* grants or leases his estate to him in remainder for term of life, habend. to the grantee in remainder for term of life of the same grantor; and per Wilby J. clearly this is only a surrender; contra if the tenant for life had leased to a stranger for term of life of the stranger, this had been a forfeiture. Br. Surrender, pl. 17. cites 24 E. 3. 32. 68.

grants his estate to him in the remainder for life; the law says, that this shall enure by way of surrender. Perk. l. 616. cites 24 H. 8. 15.

24. Assize; *feme tenant in tail after possibility* of issue extinct, the reversion to *R. in fee* took baron, the baron and feme aliened to him in reversion, rendering rent for life of the baron, by deed indented with clause of re-entry for non-payment by 8 days. The alienee aliened over; the rent [was] arrear; the baron and feme entered for the rent arrear, and the entry adjudged lawful by reason of the rent arrear, and not of the alienation of the alienee, and it cannot be adjudged a surrender, because it was by the baron for his life, and the feme may survive him. Br. Conditions, pl. 112. cites 29 Aff. 64.

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25. *A. bound by statute* to *B. his land is extended*. *C. recovers* against *B. in debt*, and the land extended by *B. is now extended* by *elegit* to *C.* *A. grants his estate* to the conusee; it is no surrender. 3 Le. 156. pl. 205. in case of *Cadee v. Oliver*, Arg. cites 29 Aff. 64. by Seton.

26. In assize; land was given to *A. a bastard*, and to *E. his feme*, and the heirs of *A. who had issue C.* and after *A. died*, and *C. took J. to baron*; after which *tenant for term of life* gave the land to the said *J. and C. his feme*, and to the heirs of *J.* and after *C. died without issue*, by which the lord entered for escheat, and *J. the baron brought assize*, and upon argument and adjournment, the opinion of the Court was against the plaintiff; by which he was nonsuited; for because *C. the feme was within age and also covert baron*, this was taken as a surrender and not a gift to the baron; and then because he is not heir of the part of the father of *C.* scil. of the part of *A. who was a bastard*, to whom the land was given in fee, and *E. who is yet alive* had only for term of life, therefore it is a surrender; quod mirum mihi! by reason that the baron was joined. Br. Surrender, pl. 34. cites 39 Aff. 7.

27. Land was given to *R. and J. his feme and the heirs of R.* and *R. died having issue a daughter C. who took to baron O.* and after *J. who survived*, gave the land to *C. and O. her baron in tail*, the remainder in fee to *O.* Quære, if it be a surrender? It seems that it is not by reason that the baron is joined with her. Br. Surrender, pl. 20. cites 39 E. 3. 29.

28. Land was given to *baron and feme*, the remainder to *J. S.* the baron discontinued and retook to him and his feme the remainder to *W. N. and died*; the feme claimed in by the second estate, and surrendered part to *W. N. in the last remainder*; and because the feme

by

by the taking of the second estate was remitted, and the first remainder also, therefore this gift is no surrender to the second remainder, but only a grant of his estate: for the remainder is in J. S. by award. Br. Surrender, pl. 36. cites 41 Aff. 1.

29. If my termor agrees that I shall make feoffment to a stranger, this is a surrender; per Frowick Ch. J. who said that this case is adjudged in our books. Brooke says, quære, where? because he believes that it is not law. Br. Surrender, pl. 48. cites 41 Aff. 2. Naked consent of tenant for life, that reversioner in tail
 should make a feoffment, amounts not to surrender of the estate for life. Resolved per Cur. Hill. 2 W. 3. B. R. Carth. 110. Swift v. Heath.

30. A. leased to B. for life, the remainder to C. in tail, the remainder to D. in fee, and after B. aliens to C. and his feme; this is no surrender, by reason that the feme was jointenant. Br. Forfeiture de Terres, pl. 84. cites 41 Aff. 2.

31. If the tenant in dower leases her estate to the heir, rendering rent, for term of her life, the heir shall have his age in the life of the tenant in dower; for this is a surrender, and the heir is in by the ancestor. Br. Age, pl. 8. cites 45 E. 3. 13. Per Finch. Br. Voucher, pl. 30. cites S. C. Perk. f. 623. cites S. C.—Br. Surrender, pl. 5. cites S. C.

32. In scire facias upon a fine, it seems by the argument, that where fine is levied to baron and feme in tail, the remainder to W. in fee, and the baron dies without issue, and the feme leases her estate to W. who has issue, and dies, the issue shall not have scire facias to execute the fine; because the lease to W. the father was a surrender. Br. Surrender, pl. 6. cites 45 E. 3. 18.

33. Fee simple cannot be surrendered without livery of seisin. Br. Confession, pl. 15. cites 12 H. 4. 20, 21.

34. If a man leases his land for 20 years, and after grants a rent-charge of 20s. out of it, and after the termor grants his term to the lessor within 4 years, the lessor shall hold charged within the 20 years; for this grant is a surrender, and the lessor is in fee, and not in by the termor. Br. Surrender, pl. 10. cites 5 H. 5. 8. Br. Charge, pl. 10. cites S. C. [138]

35. It is not properly a surrender, but where he who surrenders gives possession to him who takes by the surrender. Br. Surrender, pl. 13. cites 22 H. 6. 51. per tot. Cur. except Port.

36. If a man, seised of an acre of land, lease the same acre for life, the remainder for life unto a stranger, and the lessee grants his estate unto his lessor, that shall enure by way of grant; and yet the grantee is seised of the whole reversion at the time of the grant; but the same reversion is not to take effect immediately after the estate of the lease determined, if he in the remainder be living, as he is at the time of the grant. Perk. f. 83.

37. If lessee for life of land grant his estate unto him in the reversion, and to two other men, it is a surrender for no part. Perk. f. 618.

38. Release of lessee for years to lessor does not amount to a surrender; for release supposes lessor in possession. Jenk. 30. 4. pl. 58. See (H) pl.

Bendl. 35.
Pl. 59.
Anon. S. C.
accordingly.

39. A lease is granted to a feme sole for life, remainder to her for 20 years, and after lessor makes a lease for 40 years to J. S. to commence after the death of the feme, and the term of 20 years; and afterwards J. S. marries the feme, and the feme dies. The baron has both the terms, and his last is not surrendered nor determined; for surrender cannot be before the said term commenced in possession. And. 32. pl. 80. Mich. 5 E. 6. Anon.

* See
(A.2) pl. 8.

40. Three things are incident to a surrender. 1. An actual possession in him who surrenders. 2. An actual remainder or reversion in him to whom the surrender is made. 3. * Consent and agreement between the parties, Arg. Owen, 97. in case of Perrin, al. Porey v. Allen.

41. Lease for years; after the lease made lessor says to lessee, Though I have not excepted it in my lease, yet I mean to have the chamber over the kitchen to put my stuff in, till my son comes of age: to which lessee answered, he was well content with that. On which lessor put his stuff there. Per Popham, Att. Gen. this does not amount to a surrender, but is only a permission for a time. 3 Le. 223. pl. 301. Trin. 30 Eliz. in the Exchequer, Queen v. Littleton.

42. Tenant for life levied a fine come ceo, &c. to him in reversion in fee, and declared the uses to the cognizee and his heirs, upon condition that he paid the tenant for life the yearly sum of 4l. during his life, and in default of payment thereof, then to the cognisor for his life, and for one year over. The annuity being not paid, nor demanded, the tenant for life entered. The question was, whether this fine was a surrender; but it was held, that it was no surrender; for a fine implies a gift in fee-simple, and every party to it shall be estopped to say the contrary. Cro. E. 688. pl. 23. Trin. 41 Eliz. C. B. Smith v. Warren.

43. The king seised in fee of the rectory of St. Saviour's in demesne as of fee, as in right of his crown, demised the same to the church-wardens of St. Saviour's for 21 years. Afterwards by letters patents reciting the said lease, and that the said church-wardens modo habentes, & ad præsens possidentes, the said estate, interest, &c. yet to come in the said rectory, had surrendered the same, he, in consideration of the said surrender, and of 20l. demised it to them for 50 years. Resolved that there was no occasion of any actual surrender, because the words modo habentes, &c. proved, that at the time of the making the said new demise the other was in being; and that instead of their making any surrender before the new demise, the acceptance of the new demise should be a surrender of the old. 10 Rep. 66. b. Trin. 11 Jac. in the Exchequer, Church-wardens of St. Saviour's, Southwark.

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44. Before remotion of the clerk, the king cannot present the same clerk, who is in by usurpation; for this cannot enure as a surrender and new presentment. See Presentation, (Q. 2) pl. 5. and Roll. Rep. 236, in case of the King v. the Bishop of Norwich.

Hob. 203.
pl. 257.
S. C. the
husband
could not

45. R. S. brought waste against H. and E. his wife, and declared, that the queen by letters patents granted the lands to E. for life, remainder to the plaintiff, and that H. the defendant married the said E. and committed waste. The defendants by their plea confess

confess the lease and marriage; but farther say, that 2 Feb. anno 40 Eliz. they surrendered the estate of the said E. to the queen, to the intent that she should grant a new lease to the said E. and 2 others for their lives; which surrender the queen accepted, and 3 Feb. made a new lease. Issue being taken thereupon, the jury found the new lease made 3 Feb. reciting that she surrendered the estate and the grant, and that the queen, in consideration of money, &c. and that the new lease was made with the consent of H. the husband, and that he and E. agreed to it, and held claiming by the said new lease; adjudged that the consideration which procured the new lease was the surrender of the old lease, which surrender was not absolute, but defeasible, if E. survive, or H. disagree, and then the old lease is revived. Besides the freehold for life, which H. had in right of E. his wife, could not be given away by his bare assent; but if that lease had been made *de novo* to him and his wife, then it had been questionable; because the estate passed by implication, viz. by a surrender in law, by the acceptance of the new lease. Hutt. 7. Trin. 14 Jac. Swaine v. Holman.

be said to surrender to the queen but by record; whereas his assent was not of record, but was a matter dehors, as it was found by the jury.

46. It was held, that if the indenture of lease be given up to the lessor, and accepted by him, this is a surrender in law. Clayt. 131. pl. 236. March 1648, before Thorpe serjeant at law, judge of assise. Anon.

Grantee of rent delivers up the deed to the grantor, this is no surrender.

but he may sue for his rent, if he can recover his deed again; for a chose en grant must be surrendered by deed; per Cur. Vent. 297. Trin. 28 Car. 2. B. R. in case of Woodward v. Aston.

47. Where a surrender may be made, and both estates come into the same hands, this amounts to a surrender. Arg. Skin. 263. in case of Knight v. Greenville, cites Co. Litt. 41, 42. Poph. 30. For no man can have an estate in possession and reversion also, without an intermediate estate in some other.

A Grant by operation of law turns to a surrender, because a man cannot have 2 estates of equal dignity in the law at the same time. Arg. 3 Mod. 308. in the case of Thomson v. Leach.

states of equal dignity in the law at the same time. Arg. 3 Mod. 308. in the case of Thomson v. Leach.

(H) By what Words it may be.

[1. **T**HE word *surrender* is not necessary to make a surrender, if there are other words which tantamount, 40 Ass. 16. adjudged.]

* Fol. 498. Br. Surrender, pl. 35. cites S. C.

When the words prove a sufficient assent and will of him who is the particular tenant, that he in the remainder or the reversion shall have the thing which he has or holds, they are words sufficient to make a surrender, if he to whom the surrender is made do agree thereunto. Perk. s. 607.

[2. If lessee for life saith to the lessor, that he grants that he shall enter into the land, and that he will that he shall have the land, [this amounts to a surrender.] 40 Ass. 16.]

Br. Surrender, pl. 35. cites S. C. — If lessee for life, or for

years, of land, say to his lessor, that his will is that his lessor shall enter into the land which he holds for life, or for years, and shall have the same, and by force thereof the lessor does enter into the same, it is a good surrender; and so shall it be, if he say unto his lessor, or unto him in the remainder or reversion, that he wills that he have the land, and the lessor does enter by force thereof, or agrees thereto, it is a good surrender; but if the lessor, &c. does not enter by force thereof, nor agrees thereto, the surrender

der is not good; for he cannot surrender to him against his will. But if he to whom the surrender is made do once agree to the same, he cannot afterwards disagree thereto. And in the time of king E. 1. the lessor did enter into the land leased for life, with the assent of the lessee; and because it was not in the presence of good men of credit, it was holden to be a void surrender. But the law is otherwise at this day, &c. Perk. f. 608.

If the lessee comes to him in the remainder, or in the reversion, and says to him that he will occupy the land no longer, and be in the remainder by force thereof does enter, it is a good surrender. And if the lessee does say to his lessor, I do surrender unto you the land which I hold of your lease; or if he said, I hold such land or house, &c. and shews certain the land or house, &c. of your lease, and I do surrender the same land or house, &c. to you, and the lessor doth agree thereto, the same is a good surrender. Perk. f. 609.

3. In assise; tenant in tail discontinued, and the discontinuee died seised, and 3 heirs after him, and the 3d heir on his death-bed sent for the issue in tail, and bailed to him the deed of entail; and said to him that he had right to the tenements, and surrendered them to him by parol, and died in the house of the tenements; and the issue in tail entered by the surrender upon the heir of him who surrendered, who interrupted him; and the surrender awarded good, and the entry lawful. Br. Surrender, pl. 33. cites 34 Aff. 2.

S. P. Jenk.
30. pl. 58.

If tenant
for life re-
leases to him
in reversion.

4. Release of lessee for years to lessor, does not amount to a surrender, because of the repugnancy; for the lessee is in possession, and the release supposes the lessor in possession. Jenk. 195. pl. 2.

it is void; because it cannot enure as a release, for he is in possession; nor can it enure as a surrender for want of apt words. So of lessee for years; per Anderson Ch. J. But Snagg said he knew it ruled in a case of great importance, that though the words did not amount to a surrender, yet the consent and agreement of the lessee, which is proved by the deed, will amount to a surrender. Cro. E. 21. Trin. 25 Eliz. C. B. pl. 2. Anon.

Tenant for years remises, releases, discharges, and for ever quits claim to him in reversion. The Court inclined that it was a good surrender; sed adjournatur. 1 Lev. 145. Mich. 16 Car. 2. B. R. Maon v. Tredway.

5. A. was lessee for years rendering rent, and afterwards the reversion was granted to B. for life, remainder to C. in fee. A. attorned to B. Afterwards B. by deed released to C. all his right, &c. with words excluding him to make any claim for the future. C. reciting all this matter, granted his said reversion and remainder to J. S. in fee, to whom A. paid the rent; and B. likewise released to J. S. and his heirs, &c. all his right, with like words as in the other release. Dyer, Weston, and Welshe J. held, that nothing passed by this release, because there were no words of surrender in the deed. And Saunders Ch. B. and Browne accorded, but Catlyn and Whiddon e contra. D. 251. a. pl. 91. Pasch. 8 Eliz. Stepkin v. Lord Wentworth.

6. Tenant in tail leases for years; afterwards lessor covenants and grants with lessee, that he shall have and hold the land to him and others during the life of lessor, but no livery and seisin was made. By the opinion of 3 justices, this is neither surrender nor confirmation to enlarge his estate, and is only a covenant, notwithstanding the word grant; but Weston J. seemed e contra, by reason of the word grant. D. 272. pl. 34. Pasch. 10 Eliz. Cardinall v. Sackford.

Cro. E. 156.
pl. 39. Mich.

7. Tenant at will cannot surrender; and if he says, I agree to surrender my lands, this by 3 Just. against 1, is not any thing in present.

present, but an act to be done in futuro. Le. 177. pl. 250. 31 & 32 Eliz. B. R. *Sweeper v. Randal*.
Trin. 31 Eliz. B. R. *Sweeper v. Randal*.
S. C. accordingly.

8. *Lease for life, remainder for life*; and afterwards he in remainder for life, during the life of the tenant for life in possession, and in his presence upon the land, surrenders to reversioner by these words, viz. *I surrender and yield up the tenements to you*, and then delivers up the lease to the reversioner, by whom the lease was granted to him. Per 3 * Just. this is not good, but it ought to be by deed; but Mountague J. contra. Et adjournatur. 2 Roll. Rep. 20. Pasch. 16 Jac. B. R. *Bennet's case*.
Poph. 125. S. C. by the name of *BENNET v. WESTBECK*, but states it to be done by assent of the tenant for life, but to

a stranger upon the land in the absence of the lessor; and that he said he surrendered to him in reversion. It was objected that this surrender could not enure to him in reversion, being absent. Sed non allocatur; for the sole point in question was, whether he in remainder for life can surrender without deed? And as to that this rule was taken, viz. that what cannot commence without deed, cannot be granted without deed; as a rent, reversion, common, advowson, &c. But in this case this took effect by livery, and not by deed; and therefore might be determined without deed. Mountague and Haughton agreed, that it might be surrendered without deed, but that it could not be granted over without deed; but Doderidge J. said it could not be surrendered without deed, but that tenant in possession may, or tenant for life, and he in remainder together may surrender to him in the reversion; but this shall enure as 2 several surrenders, first of him in remainder to the tenant for life, and then by the tenant for life to him in the reversion. And Croke J. agreed with Doderidge, because the estate of him in possession is an estoppel to the surrender, so that it could not be surrendered without deed.

* [141]

(I) In what Cases a Surrender shall be *hindered by* See (F)(G). *other Estate.*

[1. **I** *F lessee for 20 years grants 10 of the said 20 years to the lessor*, yet this is not any surrender, because he himself has a reversion in fee. Tr. 14 Ja. B. R. adjudged between Bacon and Waller.]
See (G) pl. 13, 14. S. C. The lessor has
but a future interest; per Doderidge and Haughton J. Roll. R. 388. S. C.

[2. *If lessee for years grants all his estate except one day at the end of the term to the lessor*, yet this is not any surrender; for this day is a reversion, and so shall hinder the surrender as strongly as if it had been 20 years. Tr. 14 Ja. B. R. adjudged between Bacon and Waller.]
See (G) pl. 14. S. C.

3. *Lease was made to W. for life, the remainder to P. in tail, the remainder to T. in tail, the remainder to the right heirs of W.* and after *W. infeoffed P. and his feme in fee*, now *T. cannot enter*; for he has not the immediate remainder. Br. Surrender, pl. 2. cites 41 E. 3. 21.
But if P. dies without issue, now T. may enter for the alienation to his disin-

heritance; per Wiching. quod non negatur. And so see that it is no surrender, because the feme was joined with P. who was in the remainder; but if she had not been joined, then it seems it had been a surrender; for tenant for life cannot infeoff him in the reversion or remainder. Br. Surrender pl. 3. cites 41 E. 3. 21.

4. In debt the defendant pleaded surrender, and the case was, that an abbot leased land for term of 20 years to B. C. who leased over to E. for 5 years, who leased his interest by indenture to W. N. rendering 20 marks per annum; and in debt brought by E. against W. N. the defendant pleaded that the said E. and this W. N. now defendant

his lessee, before any rent arrear, surrendered their estates, which they had in the land, to the abbot first lessor, who agreed to it, judgment, &c. And by all the justices, except Brian, this is no good surrender; for there was *no privity between the 2d and 3d lessees, and the first lessor*, and therefore a void surrender; and also the third lease, with reservation of the rent, had been void, but by reason of the deed indented; because the *second lessee had no reversion in him*, and also the surrender in such case is not good without deed; for of a rent, &c. which cannot pass without deed, nor commence without deed, there the surrender of such a thing is not good without deed. And note also here, that *there is not any immediate reversion or remainder between the 2d lessee and the 3d lessee, and the 1st lessor*; and so void, by the best opinion. Br. Surrender, pl. 16. cites 14 H. 7. 2.

5. If a *lease for life* be made of land by A. to B. the remainder to C. for life, the remainder to D. in tail, and B. surrenders to C. or to A. his lessor (*who has the fee in reversion*) leaving out him in the remainder for life, this surrender is void to take effect as a surrender; because he unto whom the surrender is made, has not the immediate estate in remainder to him that makes the surrender. But if he who made the surrender had but an *estate for years*, and in the surrender there be words which amount unto a grant of his estate, then the surrenderee shall take the same by way of grant of his estate, &c. Perk. f. 588.

But if an after-made lease to C. by another indenture of the same

6. A lessee for years remainder for years to B. This remainder for years hinders the surrender of lessee for years to lessor; focus of an after-made lease to commence after the first lease. Jenk. 256. pl. 49.

land had commenced with the lease to B. then it is only a lease by estoppel, and does not hinder the surrender of B. For it is not one and the same estate with the lease of B. and conjoined. But in this case if B. surrenders, C. shall enjoy his lease, and if in the last case B. attorns to C. then C. shall have it as a reversion, and the rent as incident, and such reversion binds surrender by B. to A. the first lessor, for he is not immediate to him. Jenk. 256. pl. 49.

7. Lessee for life makes a lease for years rendering rent, and after surrenders to the lessor on condition. Lessee for years takes a new lease for years of the lessor; lessee for life performs the condition and puts out the lessee for years, who re-enters, and the lessee for life brings debt for the first rent reserved, and ruled that it does not lie; for the lease out of which it was reserved is gone and determined. Cro. E. 264. pl. 4. Mich. 33 & 34 Eliz. B. R. Brewster v. Parrot.

(K) How a Surrender may be made.

• Br. Dower, pl. 74. cites S. C. [1. A Surrender may be upon condition. * 14 E. 4. 6. adjudged. Perkins, f. 624. 44 E. 3. 3.]

S. P. Br. Surrender, pl. 41. cites 7 E. 4. 26. — S. P. Co. Litt. 218. b.

You must know, that a surrender of a freehold made by deed indented upon condition is good, and if the surrender be of an *estate for years* in land, then the surrender may be upon condition without deed; and if a surrender be made of the freehold by deed indented upon condition, that if he to whom the surrender

surrender is made, do not go unto York within one month next following the date of the surrender, that then it shall be lawful for him who made the surrender to re-enter into the land; the same is a good surrender upon condition. Perk. f. 624.

[2. Tenant for life, and he in reversion for life may surrender without deed, and the estate of him in reversion shall be surrendered thereby; for it seems this shall enure first as a surrender of the lessee to him in reversion, and then as the surrender of him in reversion, so that he surrenders an estate in possession. 27 Aff. 46. adjudged.]

[3. A surrender of an estate for life may be without livery. As tenant in dower gave the land to 44 Aff. 3. Curia.]

him in the reversion by dedi, concessi & confirmavi for her life rendering rent, and for default of payment to re-enter; and in assise brought by the tenant in dower against him of the land, he pleaded the deed quod ipse ratificavit & confirmavit the land to him in reversion then seised of the reversion habendum for life of the tenant in dower, rendering 5 l. rent, which he has been always ready to pay, and would not use the deed as a gift, but as a surrender; and the opinion of the Court was, that it is a surrender and not a lease; and this notwithstanding the condition and the rent reserved. Br. Surrender, pl. 37. cites 44 Aff. 3.

* But tenant of fee-simple cannot surrender to the lord without livery of seisin. Br. Surrender, pl. 9. cites 12 H. 4. 21. — Br. Condition, pl. 15. cites S. C.

* [143]

4. In assise, it was admitted a good bar, that the tenant brought *præcipe quod reddat, scilicet, dum fuit infra ætatem against the plaintiff, and he rendered to him the land in pais, judgment si actio; for per Fish, this is all that the writ demands; for it is præcipe N. quod reddat B. such land. By which the issue was taken, that he disseised him, absque hoc that he had any thing of his render, quod nota; and the assise was taken; which said that he did not surrender. Br. Barre, pl. 64. cites 27 Aff. 37.*

Br. Surrender, pl. 28. cites S. C. But Brooke says, it seems that the intent of the writ is that he shall come into the court

where the writ is returnable, and render it there, so that it may be of record to bar the demandant at another time; and yet the writ says further, et nisi fecerit, & prædictus (le demandant) fecerit te securum de clamore suo prosequend. tunc sum. per bonos summonit. prædict. (le tenentem) quod sit, &c. ostensur' quare non fecerit, &c. And so it seems that in ancient time, it sufficed that the tenant render in pais according to the words of the writ.

5. Lessee for years cannot surrender by attorney; but he may make a deed importing a surrender, and a letter of attorney to another to deliver it; per Clench. Le. 36. pl. 45. Trin. 28 Eliz. B. R. Anon.

6. A surrender may be to an use. Cro. E. 668. pl. 23. Trin. 41 Eliz. in C. B. Smith v. Warren.

Whether lands in fee may be sur-

rendered to an use was doubted by Coke. Roll. R. 412. — They may be surrendered according to the custom of a manor, Roll. R. 411. Wastell v. Yelton — 3 Bulst. 270. Elkin v. Wastell, Mich. 14 Jac. S. C. and there 231. It was urged that fee-simple land may be surrendered by the custom, and that it had been so adjudged here; and this seems admitted by Coke C. J.

(L) In what Cases Surrender may be without Deed, and in what not. What Thing.

See (H) Bennet v. Westbeck. (N) pl. 20.

[1. A Corodie cannot be surrendered without deed. 12 H. 4. 17.]

[2. Such thing which cannot be created without deed, cannot be surrendered without deed. 19 H. 6. 33. b.]

cites S. C. — S. C. cited Poph. 137. Fitch. 16 Ja. in case of Bennet v. Westbeck. — S. P. but a thing

Br. Monstrous, pl. 54. S. P.

thing which may be leased without deed may be surrendered without deed, though the lease was by deed, per Markham. Br. Surrender, pl. 12. cites S. C.

S. P. Br. [3. As a rent charge or rent seek cannot be surrendered without deed. 19 H. 6. 33. b.] Surrender, pl. 12. cites

S. C. — S. P. Ibid. pl. 16. cites 14 H. 7. 2. — Br. Monstrans, pl. 54. cites S. C. But surrender of land is good without deed thereof made; for it may pass without deed as by livery. — S. P. Perk. pl. 581, 582.

[4. Lessee for years of a manor cannot surrender it without deed, because it cannot pass without deed. Tr. 5 Ja. B. agreed per Curiam, between Bucknam and Warnford.]

If lessee for life be of land or of a house, and the grantor [5. If a man grants a reversion for years by deed as he ought, and after this comes into possession, this may be surrendered without deed. Tr. 5 Ja. B. R. per Coke.]

grants the reversion unto a stranger for life, and the lessee attorns, the grant is void if it be not by deed. And yet if the lessee dies, and the grantee enters into the land, he may surrender the same without deed and out of the land, if the surrender be made within the county where the land is. But if the surrender be made in another county, it ought to be by deed, &c. Perk. f. 583.

[144] 6. If a man be tenant by the curtesy, or tenant in dower, of an advowson, rent or other thing that lies in grant, albeit there the estate begins without deed; yet in respect of the nature and quality of the thing that lies in grant, it cannot be surrendered without deed. Co. Litt. 338. a.

7. So it is if a lease for life be made of lands, the remainder for life, albeit the remainder for life began without deed; yet because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be surrendered without deed. Co. Litt. 338. a.

8. A. tenant for life, remainder to B. and C. for life. C. purchases the reversion in fee; A. and B. surrender to C. but without deed; per Fenner J. the surrender is void; for if it be good it must first be the surrender of him in remainder, which cannot be without deed, and it cannot be the surrender of the first tenant for life to him; for there is no word of surrender between them. Cro. E. 269. pl. 9. Hill. 34 Eliz. B. R. Perkins v. Perkins.

9. A corporation aggregate cannot make an express surrender without deed in writing under their seal, yet they may by act in law surrender their term without writing; for fortior & potentior est dispositio legis quam hominis. Admitted. 10 Rep. 67. b. Trin. 11 Jac. in the Churchwardens of Saint Saviour's, Southwark's case.

Lessee for years agreed to surrender his lease to the lessor, and delivers the key, which lessor accepts, but afterwards refused to take the surrender of the lease; decreed by Lords Commissioners that the lessee should be discharged of the rent. 2 Vern. 112. pl. 109. Mich. 1689. Natchbolt alias Knatchbull v. Porter.

10. 29 Car. 2. cap. 3. enacts, That no leases, estates, interest of freehold, or terms of years, or any uncertain interests in or out of any lands, tenements, or hereditaments, not being copyhold or customary interest, shall be surrendered, unless by deed or note in writing signed by the parties, making them, or their agents authorised by writing, or by operation of law.

Upon a case referred to the Lord Ch. B. Gilbert for his judgment, at his chambers, he gave his opinion, that since the statute of frauds and perjuries, a lease for years cannot be surrendered by cancelling of the indenture, without writing, because the intent of that statute was to take away the manner they formerly had of transferring interests to lands, by signs, symbols, and words only; and therefore as a livery and seisin, on a parol feoffment, was a sign of passing the freehold before the statute, but is now taken away by the statute, so he takes it, that the cancelling of a lease was a sign of a surrender before the statute, but is now taken away, unless there be a writing under the hand of the party. And the words, viz. By act and operation of law are to be construed a surrender in law by the taking a new lease, which, being in writing, is of equal notoriety with a surrender in writing. Gilb. Equ. Rep. 236. Cases in Ireland, in time of Geo. 1. Magennis v. Mac-Culloch.

(L. 2.) What Estate.

[1] [6. **E**STATE for life of land may be surrendered without deed. 40 E. 3. 41. b. 19 H. 6. 33. b. 50 Aff. 1.] S. P. And without livery; because it is but a yielding or a restoring of the estate again to him in the immediate reversion or remainder, which are always favoured in law. Co. Litt. 338. a.

Lessee for life or years of land, or of a house, upon condition by deed indented, may surrender his estate without deed. Perk. pl. 583.

[2] [7. One jointenant may surrender to his companion (admitting that he may surrender) without deed. 40 E. 3. 41.]

3. Surrender of a term upon condition, is good without deed. S. P. Br. Conditions, pl. 149. cites 7 E. 4. 49. Contra of such surrender of a lease for term of life upon condition; for this ought to be by deed. Br. Surrender, pl. 40. cites 7 E. 4. 16.

4. Estates in fee of some things issuing out of lands may be determined by the surrender of the deed to the tenant of the land by which deed it was granted, &c. Perk. f. 585.

(L 3) To whom. [The King.]

[145]

[1.] [8. **T**HE tenant of the king (admitting that he may surrender) cannot surrender without deed. Contra, 49 E. 3. 5. 50 Aff. 1.]

(M) What shall be said a Surrender of Part, or of all.

[1.] **I**f lessee for years of land accepts a new lease by indenture of part of the land before leased to him, this is a surrender only for this part, and not for the whole. Hill. 43 Eliz. B. R. per Curiam, between Fish and Campion.]

2. A man leased for life rendering rent, and after the tenant for life granted his estate to the lessor and 2 others; and the best opinion was, that this is a surrender for the 3d part; for when the fee and the franktenement come together, the one determines the other, and so the jointure determines, and they are tenants in common; and yet the opinion of Perkins in his book is, that it is no surrender for any part for the advantage of the other two; but

If tenant for life makes a lease for his own life to the lessor, the remainder to the lessor, and an stranger,

in fee; in this case, forasmuch this does not so appear in this book. Br. Surrender, pl. 11. cites 7 H. 6. 2, 3.

as the limitation of the fee should work the wrong, it enures to the lessor as a surrender for the one moiety, and a forfeiture as to the remainder of the stranger; for he cannot give to the lessor that which he had before; and as to the remainder to the stranger, it is a forfeiture for this moiety, and when the lessor enters he shall take the benefit of it. Co. Litt. 335. a.

If lessee grants his estate to lessor and a stranger, this is a surrender for a moiety. Arg. 2 Roll. R. 445. in case of Eustace v. Scayen.

3. Where there are two co-heirs, and the tenant for life grants his estate to the one, this is no surrender but for the one moiety, and of the other moiety the other may have writ of waste, though the action of waste shall be in name of both, and the one shall be severed as it seems. But quære; for it seems the action of waste shall be of the moiety; quære before partition and severance of the land. Br. Surrender, pl. 23. cites 21 H. 7. 40.

4. If A., B., and C. be joint feoffees of lands, to have and to hold unto them and to the heirs of B. and afterwards A. does release all his right to C. and afterwards C. surrenders to B., &c. it is a good surrender for the 3d part of the land, &c. Perk. f. 587.

5. If I hold one acre of land for life, of the lease of the father of J. S. and I hold one other acre for life or years of the lease of J. S. and I surrender unto J. S. the land which I hold of his lease, by this surrender he shall not have the land which I hold of the lease of his father, notwithstanding that the reversion of the same acre be in him by descent from his father, &c. Perk. f. 611.

6. A., B., and C. jointtenants join in the lease of a house to J. S. to commence from Michaelmas last. Afterwards on the same day B. and C. without A. demise the same house to J. S. to commence from the same time and for the same number of years as in the lease made by all three; and in ejectment by J. S. he declares upon both these leases. Resolved that the declaration was not double; for when the 3 demised the whole, and afterwards 2 of them demised all the same thing, this is a surrender of the first lease, and a new lease of their two parts, and the old lease continues as to the 3d part of A. and so J. S. entered, and was possessed by both leases, viz. of the 3d part of A. by the first lease, and of the two parts of B. and C. by the 2d lease; and so affirmed a judgment in B. R. 3 Lev. 117. Pasch. 34 Car. 2. in Cam. Scacc. Tubervill v. Stockton.

(N) Pleadings.

1. **I**N assise Bagot pleaded surrender of letters patents of the office of clerk of the crown of the Chancery into the hands of the king, viz. *Quod idem W. S. coram dicto domino rege in Cancell. sua tali die & anno eadem Cancell. apud villam Westm. tunc existente personaliter constitutus ex certis causis ipsum moventibus totum jus, statum, tit. & interesse sua quod ipse in dicto officio ac in 20 li. pro exercitio ejusdem habuit, concessit, ac officium illud gratis, pure, sponte, realiter, & absolute sursum reddidit dimisit, & resignavit, prefato domi-*

no regi, ac literas illas sibi inde factas in Cancell. predicta ibidem ex causis predictis tunc ibid. restituit Cancellandas. Br. Surrender, pl. 18. cites 9 E. 4. 7.

2. In replevin the defendant rejoined, that lessee surrendered *dimissionem predictam*, without saying that he surrendered the tenements or all the estate therein. But it was held, that these words imply all his estate and interest, and so it is intended; and though the usual course is to plead surrender of the estate, yet all is one, and so much is implied. Cro. C. 101. Hill. 3 Car. C. B. Peto v. Pemberton.

Litt. Rep. 83. S. C. & P. accordingly; for in common parlance, when it is said such an one had a lease for

years, not only a writing is intended, but a term; and in the books it is said that he surrendered his lease, &c. and cited SIR JOHN PAGINTON'S CASE adjudged, which was, that he made a feoffment in fee upon condition, that if he paid money at such a day, then the charter of feoffment should be utterly frustrate and void, but did not say that the estate should be void, or the livery and seisin, &c. And yet adjudged that this goes to the estate, and yet the deed does not make the estate, but the livery. And says Coke remembered this case in 5 Rep. and that the case is more strong than a lease for years, as the principal case is, which is only a contract; that if it was estate of franktenement, it ought to be intrando agreavit.

3. The constant form of pleading a surrender, is not only to plead the surrender, but to plead it *with an acceptance*, viz. to which the surrenderee agreed; and so are all the precedents, unless one or two in Rastal. Per Pollexfen Ch. J. Rooksby & Powell. 3 Lev. 284. Trin. 2 W & M. B. C. in case of Thompson v. Leach.

For more of Surrender in general, see Coppbold, Extinguishment, Fines, Release, and other proper titles.

Survivor.

(A) What Things Survivor shall take.

1. **I**F an obligation be made to many for one debt, he who survives shall have the whole debt or duty. And so it is of other covenants and contracts, &c. Litt. f. 282.

2. Money lent on a mortgage in trust, and with intention, that each of the mortgagees should have his money and interest again, there shall be no survivorship. Chan. Rep. 57. 7 Car. Petty v. Styward. [147]

3. Joint farmers of excise; per Finch C. if there had been no covenant that it should survive, yet in equity it ought, by reason

of the joint charge and expence. If there had been any agreement among the farmers that it should not survive, that might have altered the case. Vern. 33. Hill. 1681. Hays v. Kingdom.

4. Where two become *jointenants*, or jointly interested in a thing *by way of gift*, or the like, there the same shall be subject to all the consequences of law. But as to a joint undertaking in *the way of trade*, or the like, it is otherwise. Vern. Rep. 217. Hill. 1683. Jeffries v. Small.

See 2 Lev.

218, 219.

Hill. 29 &

30 Car. 2.

B. R. Low-

ry v. Reints, where this point was moved, and cited D. [189. b. &c. pl. 15. &c. Mich. 2 & 3 Eliz.] Lord Bray's case, that by the death of one the authority is determined; but in the principal case the Court said nothing to the point.

5. If a *guardianship* was granted to 2, if one dies, it shall survive to the other. G. Equ. Rep. 177. Pasch. 8 Geo. 1. Earl of Shaftsbury v. Countess of Shaftsbury.

(B) *In what Cases Survivor shall take.*

1. **I**F a *demise* of lands be by 3, on condition to pay them 100*l.* equally to be divided, and one of them dies, his executor or administrator shall have the money. Brownl. 32. a nota there.

If a rent-

charge be

granted by

A. to his

band and

wife, during

the life of the

wife, and

the wife sur-

vives, she

shall have the rent.

2. If I make a lease for years, reserving *rent during my life, and my wife's life*, if I die, the rent is gone, because *she is a stranger*; and she shall never have the rent, because she has no interest in the land. If one of them die, nothing can survive to the other, and a limitation must be taken strictly, otherwise it is by way of grant, that shall be taken strongly against the grantor. Brownl. 39. a nota.

Brownl. 171. Hill. 15 Jac. Brown v. Dunry.

3. Lands charged by deed with 100*l.* to be raised and divided among 5 children, one dies before distribution; the survivor shall have his share, and not the devisee of him that is dead. 2 Chan. Rep. 129. 29 Car. 2. Woolstenholm v. Swetnam.

4. *Joint-purchase* by A. and B. of a building-lease, in the name of C. who declared it a trust for A. and B. and of another building-lease in D.'s name, who also declared the trust for A. and B. —A. dies, and M. his executor, and E. (who had taken the houses in execution) assigned to J. S. —B. became bankrupt, and the commissioners assigned to R. S. —R. S. conveys to W. S. —W. S. denies notice of the title of J. S. but confessed his having C.'s assignment, and the declaration of *trust* put therein, and that the lease to C. was not assigned to him by any express words.—Yet, W. S. being a purchaser, though under those circumstances, Trevor Master of the Rolls dismissed the bill without costs, and the rather because the plaintiff did not bring the *bill* till after defendant's purchase, though plaintiff's purchase was made 2 years before. Vern. R. 360. Hill. 1685. Usher and Prime v. Aylworth, Edmonds, & al.

(C) *By what Limitation Survivor shall take.*

1. **G**IFT to 2 *in tail*; here are estates tail executed with several inheritances; but if one die, the other shall have all by survivor for his life; per Haughton. Roll. R. 178. Pasch. 13 Jac. in case of Bowles v. Berry.

2. So gift to 2 and the heirs of one, if he who has the fee dies, the other shall have all for his life; per Haughton. Roll. R. 178. in case of Bowles v. Berry.

3. Lands were devised to baron and feme for their lives, and after the decease of the feme, then to the child or children of her body; in this case the baron's estate determines upon the death of the feme. 2 Wms.'s Rep. 653. 671, 672. Mich. 1734. Cowper v. Earl Cowper.

4. But a limitation to them for their lives (without more) will undoubtedly carry an estate for both their lives, during the life of the survivor; per Master of the Rolls. Ibid. 671. cites 5 Rep. 9. Brudenell's case.

5. And he said, that this is the legal as well as literal and grammatical construction of those words, (for their lives,) which being plural, must comprehend both, and join them together, where there is no particular reason to vary from it; as where an office was granted to 2 for term of their lives, this was held in Auditor Curle's case, 11 Rep. 3. b. to determine upon the death of one. But in a limitation of lands, it is otherwise. And the reason of the difference is this, a jointenancy of lands may be severed; and if it be not, the interest must consequently survive, which is otherwise in an office; and that it is so in lands, is not from the import of the words of that limitation, but from the institution or operation of law; for if the words imported a survivorship, it would do so in both cases. Besides, upon a severance of the jointenancy in land, the estate does not continue during the life of each donee; but determines upon the death of one for his moiety, and of the other for his; and cited D. 67. a. and Co. Litt. * 197. a. 2 Wms.'s Rep. 672. in case of Cowper v. Earl Cowper.

* It seems it should be 191. a.

(D) Survivorship. In what Cases among what Persons.

1. **J**US accrescendi inter mercatores locum non habet; this extends to joint shopkeepers; and per Coke, there are 4 sorts of merchants, viz. adventurers, dormant, travelling, and resident; and neither of them shall take by survivorship. 2 Brownl. 99. in a nota there.

Noy, 55. Anon. That a joint-bond to joint-traders shall not survive; per Owen.

survivorship between merchants. Chan. Cases, 127. Pasch. 21 Car. 2. in case of Holtcomb v. Rivers. — Nels. Chan. Rep. 139. in S. C.

— No

(E) *By what Words a Thing shall survive the Person, or die with him.*

3 Le. 65.
pl. 97. S.P.
and there
Dyer says,
that this
case was in
C. B. about
3 years be-
fore.

* [149]

Joint cove-
nant shall
survive, as
where A.
covenanted
with B., C.,
and D. to give bond to pay 10l. to B. who dies, the covenant survives. Brownl. 207. Yates v. Rolles.

1. **A**N award was, that A. shall pay to B. during the term of six years, towards the education and bringing up of such an one, an infant. Within the 2 first years of the term the infant dies. Cited by *Dyer, who said, it was adjudged that the sum ought to be paid for the whole term after; for the words (towards his education) are only to shew the intent and consideration of the payment of that sum, and are not words of condition, &c. 2 Le. 154. in pl. 186. 19 Eliz. In C. B. Anon.

2. *Covenant to pay* so much to two; if this be *no interest*, and one dies, then there is nothing to survive; per Doderidge J. 3 Bulst. 31. Pasch. 13 Jac. in case of Quick and Harris v. Ludburrow.

and D. to give bond to pay 10l. to B. who dies, the covenant survives. Brownl. 207. Yates v. Rolles.

(F) *In what Cases the Survivor shall bring Actions, or be charged alone, or he and the Executors or Heirs of the other.*

If the heir
be within
age, and
the conusee
brings *scire
facias*

1. **I**F 4 are bound in a recognizance, and one dies, the other 3 shall not be charged with the whole, but they and the heir of the deceased shall be equally charged; quod nota. Br. Charge, pl. 27. cites 29 Aff. 37.
against the 3, it is a good plea that the 4th is dead, and his issue within age, and by his age the parcel shall demur against all; per judicium; quod nota, that charge shall not survive; and it is not said there if they were bound jointly and severally or not. Br. Jointenants, pl. 27. cites * 39 Aff. 37.—And execution shall be against the 3, and the heir of the other, and well; and judgment given, and affirmed in error. Br. Error, pl. 191. cites 29 Aff. 37.—Br. Parcel Demur, pl. 16. cites S. C.—Br. Age, pl. 36. cites S. C. per Seton and Shard, but Mowbray contra.

* It should be (29).

2. In debt upon bond against husband and wife, as heiress to her father, they pleaded non est factum of the father. The jury found that the bond was made to the plaintiff and another; whereas in truth the plaintiff declared on a bond made to himself only, without mentioning the other obligee, and he as survivor brought the action. The Court was clear of opinion, that the plaintiff ought to have declared upon the special matter. Le. 322. pl. 453. Mich. 30 & 31 Eliz. C. B. Dennis v. St. John.

3. If a bond is made to 3, to pay money to one of the 3, they must all join in the action, for they are all but as one obligee. And if he to whom the money is payable dies, the other 2 who survive ought to sue, though they have no interest in the money contained in the condition; per Cur. Yelv. 177. Trin. 8 Jac. B. R. in the case of Rolls v. Yates.

4. In

4. In debt on bond it appeared upon oyer, that *A., B., and C.* were bound jointly, and that *A. was dead*; whereas the action was brought against his executor, and the other 2. Upon demurrer the Court were of opinion that the action was not well brought; for by the death of one of the obligees, his executor is wholly discharged. Sid. 238. pl. 7. Hill. 16 & 17 Car. 2. B. R. Osborn v. Crosbern & al.

5. A judgment was obtained jointly against 3, and one of them dies, and the plaintiff sued a *scire facias* against the executor of him that was dead, and the 2 survivors. The judges seemed to incline, that the charge did survive, and the executor was not liable; but per Wylde, he might have sued a *scire facias* against the heir and the 2 survivors, because as it charged the realty, it did not survive; but he could not charge the executor. Freem. Rep. 366. pl. 468. Pasch. 1674. Anon.

Saunders of counsel with the executor, cited a case of NORTON AND HARVEY, where Harvey being executor was sued, and pleaded

several judgments, and that he had fully administered; and amongst other * judgments pleaded one which was recovered against his testator, and an estranger; and because he did not aver that his testator survived, the plea was ruled to be ill. Ibid.

* [150]

For more of *Suspicion* in general, see *Debit, Jointenants, Trust*, and other proper Titles.

Suspicion.

(A) *What is good Cause of Suspicion to detain a Person.*

1. BILL of false imprisonment in B. R. the defendant said that certain persons said to him that the plaintiff and J. N. were come to L. with certain oxen, which were stole, as they thought; and he came and found the oxen in an obscure house, and arrested him upon suspicion; judgment si actio. And per Gascoign and Hull, it is no plea; for † suspicion is no cause of arrest, unless a felony was committed in the country before. Et adjournatur. Br. Faux Imprisonment, pl. 4. cites 7 H. 4. 35.

Bridgm. 62. Arg. in case of Weal v. Wells, cites S. C. that suspicion cannot be tried, because it is but the imagination of a man,

which lies in his own conceit. — † Serjeant Hawkins says, that generally no suspicion will justify an arrest where no treason or felony hath been committed, or dangerous wound given. 2 Hawk. Pl. C. 76. s. 16.

But the Serjeant thinks that this rule holds not as to arrests on a *hue and cry*, or by virtue of a warrant from a justice of peace. 2 Hawk. Pl. C. 76. s. 16, 17.

2. It is good cause to arrest a man, inasmuch as he is *vagrant, exercising no trade, nor doing any work.* Br. Faux Imprisonment, pl. 22. cites 7 E. 4. 20.

Goods were
stolen and
found in
the house

3. *So that parcel of the goods stole were found in the possession of the plaintiff.* Br. Faux Imprisonment, pl. 22. cites 7 E. 4. 20.
of the plaintiff, and he would *not shew how he came by them*, this gave good cause of suspicion, and being examined before a justice, giving *various and uncertain answers*, aggravated the suspicion, and was just cause of binding him to sessions. Cro. E. 901. pl. 4. Mich. 44 & 45 Eliz. B. R. Chambers v. Taylor.

* Orig. is
(Pl.)

4. False imprisonment made at W. in the county of K. The defendant said, *that at the time, &c. T. Fauconbridge with 20,000 men, as rebels and traitors to the king, intending to depose the king, assaulted the city of London, and burned houses, and killed A. and B. and the citizens drove them to Blackheath; and the common voice and fame was, that the plaintiff was one of them, and the * defendant suspecting him thereof, took him at W. and because there was no gaol in the county of K. where he might put him for doubt of rebels, he carried him to London, and there imprisoned him.* And per Cur. a man cannot arrest another for suspicion, if he himself has not suspicion thereof; nor he cannot justify by command of him who has suspicion. Br. Faux Imprisonment, pl. 25. cites 11 E. 4. 4.
—But after fol. 7. the opinion was, that it is no plea, if he *does not say that he durst not carry the plaintiff to the gaol of Kent for doubt of rebels.* Quod nota; for a man cannot justify the taking in one county, and the imprisonment in another county, unless for such special cause; but where the gaol of one county serves in two counties, there he may plead it and justify, &c. And the plaintiff maintained his writ absque hoc, that the common voice and fame in London was, that he was one of the rebels.

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5. In false imprisonment the defendant justified that a felony was done, and the common fame and voice of the country was, that the plaintiff was of ill government, and that he did the felony, by which he who was robbed came to the constable, &c. and required him to arrest the plaintiff, whereupon the constable came and required the defendant to aid him, by which he aided him to arrest the plaintiff, which is the same imprisonment. And per Keble, Vavilor, and Townsend, the plea is good; and it is lawful to arrest him by the suspicion of him who was robbed; and a man may justify the taking the goods of an alien, as servant of the Duke of G. and yet every one may seize them as well as another. Contra Brian and Hawes, and that the suspicion cannot extend but to him who has the suspicion, and to no other. Br. Faux Imprisonment, pl. 14. cites 2 H. 7. 15.

S. C. cited
Arg.
Bridgm. 62.
Trin.
14 Jac. in
case of Weal
v. Wells.

6. In false imprisonment the defendant said that J. S. was poisoned, and the common voice and fame was, that the plaintiff had done it, by which he as servant of W. N. sheriff took the plaintiff, and carried him to the prison. And per Cur. he who justifies as here, ought to allege that such a one was poisoned, and therefore for suspicion of felony he shall say that such felony was committed, &c. and this is traversable; and per tot. Cur. he cannot justify as

servant

servant of the sheriff, but of his own authority; for *when a felony is done*, and suspicion is, *every one who has the suspicion may arrest the party, but not by the command of the sheriff, unless the sheriff has writ ad illum arrestand.* by which the defendant amended his plea in this point; quod nota bene. Br. Faux Imprisonment, pl. 16. cites 5 H. 7. 4.

7. *And per Davers and Brian, if a man be indicted of felony, this is a sufficient cause of suspicion to arrest him; quod Jay and Keble negaverunt; for process ought to be awarded, and the indictment may be false.* Br. Faux Imprisonment, pl. 16. cites 5 H. 7. 4.

8. *Common voice and fame* is not sufficient to arrest a man, where no felony is done. Contra, where a felony is done. Br. Faux Imprisonment, pl. 16. cites 5 H. 7. 4.

S. P. Arg. Bridgmr. 62. in case of Weal v. Wells. —

S. P. Arg. Godb. 406. cites 7 H. 4. 35. — S. P. 2 Inst. 52. — Bulst. 149. Trin. 9 Jac. in the case of *Wale v. Hill*, Arg. cites 2 H. 7. 5. 5 H. 7. 5. 26 H. 8. 9. & 7 E. 4. 20. That common fame, in some cases, may be a good justification in a false imprisonment; but this is to be taken, if the cause, for which he was taken, be public; but otherwise it is, where the cause is private; that for taking of a man's goods in a private manner, there he ought to shew specially, that the goods were found with him, and in his possession, and not to go by belief, and to give credence to every particular man; but he ought for to shew some good and apparent cause to the Court, and so is 7 E. 4. fo. 20.

If a man be robbed in the night, and it is the common voice and fame that J. D. did it, a man may arrest him by the *fame of this county where, &c.* Contra by the voice of another county. Per Choke & Brian. Br. Faux Imprisonment, pl. 25. cites 11 E. 4. 4.

This fame, Bracton describes well: *fama quæ suspicionem inducit oriri debet apud bonos & graves, non quidem malevolos & maledicos, sed providas & fide dignas personas, non semel, sed sæpius, quia clamor minuit & defamatio manifestat.* 2 Inst. 52.

9. *Hue and cry* is good cause to take a man for suspicion of felony, and *if it be made without cause, he who made it shall be punished*, and not the other who arrested the man. Br. Trespass, pl. 213. cites 21 H. 7. 27.

S. P. Br. Faux Imprisonment, pl. 16. cites 5 H. 7. 4. — S. P.

Ibid. pl. 25. cites 11 E. 4. 4. — S. P. 2 Inst. 52.

10. *A justice of the peace himself cannot arrest a man for suspicion of felony, unless he himself suspects him, and not by the suspicion of another; and therefore cannot make a warrant to arrest him upon suspicion of another; but he who has the suspicion of felony in another, may arrest him himself.* Br. Faux Imprisonment, pl. 8. cites 14 H. 8. 16.

Br. Faux Imprisonment, pl. 33. cites S. C. — The defendant cannot arrest any of suspicion of another,

but of himself. Br. Faux Imprisonment, pl. 22. cites 7 E. 4. 20.

No causes of suspicion whatsoever, let the number and probability of them be ever so great, will justify the arrest of an innocent man by one who is not himself induced by them to suspect him guilty, whether he make such arrest of his own head, or in obedience to the commands of a private person, or even of a constable. 2 Hawk. Pl. C. 76. s. 15.

* [152]

11. If A. be suspected, and he *fleeth, or hides himself*, it is a good cause to arrest him. 2 Inst. 52.

warrant against him for robbery committed; is good cause of suspicion. Cro. E. 871. pl. 7 Hill. 44 Eliz. B. R. Pain v. Rochester and Whitfield.

Absenting himself after notice of a

12. If *treason or felony* be done, and one has just cause of suspicion, this is a good cause, and warrant in law, for him to arrest any

any man; but he *must shew in certainty the cause of his suspicion*, and whether the suspicion be just or lawful, shall be determined by the justices in an action of false imprisonment brought by the party grieved, or upon a habeas corpus, &c. 2 Inst. 52.

13. *Refusal to shew cattle* which are charged to be stolen is a good cause of suspicion, and to carry before a justice of the peace to be examined; per Doderidge J. 3 Bulst. 287. Hill. 14 Jac. in case of Weal v. Wells.

(B) Pleadings.

Br. Double, pl. 151. cites S. C. — S. C. cited Arg. Bridgm. 61. in case of Weal v. Wells, that the defendant traversed the indictment without that, that the plaintiff was in their company, and without that, that

1. **I**N false imprisonment in S. the defendant said, that before the imprisonment B. was killed in S. and the plaintiff was in the company of the murderers at the time of the felony; and the fame of the county of S. was, that the plaintiff was party to the felony, by which the defendant found the plaintiff at S. and arrested him for suspicion of felony, and committed him to the sheriff, which is the same imprisonment. And Brian said, the plea is double, viz. the fame, and the being in the company. But Markham J. contra; for in such justification a man may make 20 causes of suspicion, and all is only one suspicion. Brian said, he imprisoned him de son tort demesne, absque hoc that he was in company, or that there was such fame, and was not suffered to have both, by which he traversed the being in the company only. Br. Faux Imprisonment, pl. 22. cites 7 E. 4. 20.

the report was so, &c. And Nidkam (Markham) said there, that issue could not be taken upon the report, but upon the matter in fact; for if men say in the country that I am a thief, that is no cause to arrest me; but matter in fact ought to be shewed, which is traversable. Whereupon issue was taken upon the first matter only. And in the 9th of Edw. 4. it is holden that a man ought to shew some matter in fact, to prove that the plaintiff is suspected. And 11 Edw. 4. 46. in a false imprisonment, the defendant, who justifies upon a false imprisonment for felony, ought to shew some matter in fact to induce his suspicion, or that his goods were in his possession, of which the country may take notice. And in the 17 Edw. 4. 5. in a false imprisonment the defendant justified, because that A. and B. did rob another, and did go to the house of the plaintiff; whereupon the constable did suspect him, and did require the defendant to assist him in arresting him, &c. and holden there, that they ought to surmise some cause of suspicion, or otherwise the plea was not good.

2. In trespass the defendant justified, because a felony was done in the country, and the defendant had suspicion of the plaintiff, and entered into the house, and there found the ox that was stole, by which he arrested him. And per Cur. he ought to carry him to gaol; to which he said, that the plaintiff rescued himself. And it was [153] awarded a good plea, though he did not say that the plaintiff was suspected in the country; for he did not arrest him but for suspicion which he had in himself. Br. Faux Imprisonment, pl. 27. cites 20 E. 4. 6.

* 10 H. 7. 17. b. 2 H. 7. 15. b. 16. 5 H. 7. 4. b. 5. a. 7. Ed. 4. 20. a. 20 E. 4. 6.

3. Whosoever would justify the arrest of an innocent person, by reason of any suspicion, must not only shew that he suspected the party * himself, but must also set forth the † cause which induced him to have such a suspicion, that it may appear to the Court to have been a sufficient ground for his proceeding. Also it

- it seems ‡ certain, that regularly he ought expressly to shew, *that the very same crime for which he made the arrest, was actually committed.* But if a || man have *several causes* of suspicion, he is not bound to insist upon some one of them only, but may *allege them all*; for that the replication *de son tort demesne* answers the whole. As § where a man arrests another, who is actually guilty of the crime for which he is arrested, it seems that he needs not, in justifying it, set forth any special cause of his suspicion; but may *say in general, that the party feloniously did such a fact, for which he arrested him, &c.* 2 Hawk. Pl. C. 77. f. 18. cites the books in the margin.

b. 11 E. 4.
4. b. Cro.
E. 871.
H.P.C. 93.
12 Rep. 91.
10 H. 7.
17. b. 2 H.
7. 15. b.
16. a. 17 E.
4. 5. a. b.
† 2 Inst.
52. Finch.
340. 17 E.
4. 5. a. b.
7 H. 4. 35.

1 E. 4. 20. a. Bridgm. 62.

‡ 8 E. 4. 3. b. 27 H. 8. 23. a. Cro. J. 194. Finch. 340.

|| 7 E. 4. 20. 17 E. 4. 5. a. b. Bridgm. 62. Fin. 394. 4 H. 7. 1. b. 2. a.

§ 10 H. 7. 14. b. Fitz. Faux Imprisonment, 5.

(A) Taliter Processum.

1. **T**RESPASS for taking his beasts. Defendant justified by a plaint in a *hundred-court*, by which taliter processum fuit, that the plaintiff was nonsuited, and costs taxed, and a precept to levy; whereby he took the beasts, and traversed, that he was guilty before the delivery of the precept, or after the return. Upon demurrer it was objected, that this short way of pleading a judgment in inferior courts is not allowable. Sed non allocatur; for it is good enough, *setting out the plaint levied, but ought not to commence at the judgment, viz. that consideratum fuit.* 2 Lev. 81. Hill. 24 & 25 Car. 2. B. R. Doe v. Parmiter.

2. In *trespass* for taking his cattle, the defendant justified by virtue of an *execution* in an action of *trespass* in the *hundred-court*. The plaintiff demurred. Exception was taken, that the defendant, reciting the proceedings below, saith, taliter processum fuit; whereas he ought particularly to shew all that was done, because not being in a court of record the proceedings may be denied, and tried by a jury. But the Court inclined that it was well enough, and the *safest way to prevent mistakes*; but if the plaintiff had *replied de injuria sua propria absque tali causa*, that had traversed all the proceedings. But no judgment was given. 2 Mod. 102. Trin. 28 Car. 2. C. B. Lane v. Robinson.

3. In *trespass* and false imprisonment, the defendant justified by process out of the *court of Warwick*, on a judgment had there, on a plaint in *trespass*, super quo taliter processum fuit, that judgment

Freem.
Rep. 322.
pl. 402.
Trin. 1677.

S. C. but
not exactly
S. P.

judgment was given againſt him, whereupon he was taken, &c. Exception was taken, becauſe it was pleaded by a taliter, and *no mention was made of any declaration*; and that the pleading taliter, &c. in an inferior court, is not good. But it was answered on the other ſide, that the taliter, &c. is the ſhorter and better way; and therefore in a ſci. fa. nothing is recited but the judgment; though it is true, in a writ of error, the whole record muſt be ſet out. The Court was of opinion, that the plea was well enough as to this. 2 Mod. 195, 196. Hill. 28 and 29 Car. 2. C. B. Higginſon v. Martin.

4. In treſpaſs of taking a gelding, the defendant juſtified by a plaint in a *court-baron*, and that taliter proceſſum fuit, that the plaintiff recovered againſt the now plaintiff, and that a precept was thereupon made to the now defendant, who is an officer of the ſaid court, to levy the debt and coſts, by virtue whereof he took the gelding, and appraiſed and ſold him. The plaintiff demurred generally; and exception was taken for him, that taliter proceſſum in a court-baron is a very curt way of pleading, and that all the proceedings ought to be ſhewn at large, becauſe not being matter of record all is traverſable: *quod Curia conceſſit*. And judgment for the plaintiff, niſi, &c. 2 Jo. 129. Hill. 31 & 32 Car. 2. B. R. Garret v. Higby.

5. In falſe imprisonment the defendant preſcribed to have a court, &c. for trial of all perſonal actions, &c. and that a plaint was levied there, &c. and that taliter proceſſum fuit, and did *not ſet forth any declaration or appearance*, but only that the plaintiff had judgment, and the defendant was taken in execution, where he was detained till he paid the debt, &c. And upon demurrer it was adjudged for the plaintiff, becauſe the record in the inferior court was recited only by taliter proceſſum fuit. 2 Lutw. 913. Trin. 3 Jac. 2. Dennis v. Rowles.

Comb. 124.
Simpſon v.
Mayhill,
S. C. And
Dolben J.
ſaid, that
taliter pro-
ceſſum fuit
is ill in an
inferior
court, and
has been ſo
adjudged ſe-
veral times
ſince the
Lord Hale's

6. In treſpaſs for taking goods, &c. the defendant juſtifies by judgment in a *hundred court*, and proceſs thereupon, that there was a plaint levied in treſpaſs on the caſe, & taliter proceſſum fuit, that it was conſidered that the plaintiff ſhould pay coſts for his default, *unde convictus eſt*. This was inſiſted to be ill, becauſe in caſe of an inferior court, they ought not to plead it ſo; for that each part of the proceſs is traverſable. Holt Ch. J. ſaid, that in Lord Hale's time it was held good, though only ſaid taliter proceſſum fuit, and that in that very point himſelf was over-ruled in Sir Francis Pemberton's time, and a year ſince in C. B. adjournatur. Show. 47. Trin. 1 W. & M. Simpſon v. Merrille.

time; and there is no caſe againſt it, except the caſe above-recited by Holt, and that caſe was diſallowed by Pemberton; but Hale was always very much inclined to make pleadings good. Adjournatur.

7. In treſpaſs of taking his cattle the defendant juſtified under a plaint by J. S. againſt the now plaintiff in the *county-court for a debt of 39s. 11d.* and that ſuperinde taliter proceſſum fuit, that T. P. the plaintiff in that plaint recovered, &c. and thereupon quoddam præceptum emanavit, per quod the ſheriff commanded the

the plaintiff to levy the money, &c. and upon demurrer to this plea it was adjudged for the plaintiff (among other reasons) because the judgment was pleaded in an inferior court, not being a court of record, with a taliter processum fuit, when the proceedings should be set forth at large. 2 Vent. 100. Mich. 1 W. & M. in C. B. Pinager v. Gale.

8. In debt on bond for quiet enjoyment of lands leased to the plaintiff, the plaintiff averred, that he was prosecuted in the Exchequer by J. W. and that taliter superinde in eadem curia, &c. processum fuit, that the plaintiff there recovered against the plaintiff here 80l. and 70l. for damages, &c. prout per recordum, &c. plenius liquet, &c. It was insisted for the defendant, that the whole record of the recovery ought to be set forth at large in the declaration; sed per Curiam non allocatur; for at this day it is otherwise practised; and it is sufficient to plead, that the plaintiff recovered with a taliter processum fuit, without reciting the whole record. Holt Ch. J. says, this declaration is too general; and that the plaintiff should at least have set the matter out in this form; scil. that he was impleaded in an action of debt for so much money certain (of which this was parcel), or have set forth the whole declaration in the action brought by J. W. with taliter superinde processum fuit, so as it might appear to the Court, that the recovery was against the plaintiff for the same matter, against which he was to be defended; for that in this case he could plead no other plea than nul tiel record; and upon his opinion judgment was given against the plaintiff. Carth. 305, 306. Pasch. 6 W. & M. B. R. Hool v. Burgoigne.

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9. In trespass of assault, battery, wounding, and imprisoning, &c. the defendant, as to the force and wounding pleads not guilty, et quoad residuum transgressionis, the assault and imprisonment, he justifies, for that the plaintiff was indebted to him infra jurisdictionem Cur. de recordo de B. and for the recovery thereof the defendant implacitasset eum in the said court, and found pledges to prosecute his suit; et superinde taliter processum fuit in eadem curia, that he had judgment and execution, which he delivered to the other defendant being a bailiff, who at D. infra jurisdictionem cur' molliter manus imposuit upon him, and arrested him and detained him in prison, which are idem residuum transgressionis præd'. It was resolved upon demurrer, that this short way of pleading the judgment in an inferior court, viz. by an implacitasset, and that taliter processum fuit was good, though the usage anciently was otherwise; and though there are some cases where the plea has been held ill without reciting a plaint levied, yet by the unplacitasset and pledges found as here in this case they supply that matter. 3 Lev. 403. Mich. 6 W. & M. in C. B. Patrick v. Johnson.

2 Lutw. 925. S. C. but as to the taliter processum, though it is in the pleadings, I do not observe any notice taken of that part in the observations of the reporter. 3 Lev. 404. in S. C. was cited per Cur. Mich. 36 Car. 2. in C. B. the case of ADNY v. VERNON, where the pleadings by

taliter processum of a judgment in Worcester-court was adjudged good; but observes, that there they commenced the plea with the levying of a plaint, upon which taliter processum fuit. And likewise another case resolved by Hale Ch. J. and the whole Court. Hill. 24 & 25 Car. 2. B. R. but there a plaint was likewise pleaded to have been levied, and so held good; but that without plaint it would have been void. — See 3 Lev. 243, 244. Mich. 1 Jac. 2. in C. B. Adney v. Vernon.

10. In *trespass* defendant justified the taking, &c. by process out of the county-court, that *taliter processum fuit* that the plaintiff there had judgment, and a precept was directed to this defendant to levy the money, and so justified. Exception was taken, that such pleading is not good as to proceedings in a county-court. Several other exceptions were taken to the pleadings, and judgment was given to the plaintiff; but the reporter says, that the Court did not declare for which of them they gave their judgment. And adds a nota, that as to the abovementioned exception, it had of late time been adjudged, that the proceedings in such inferior courts may be pleaded by a *taliter processum fuit*, &c. 2 Lutw. Rep. 1410. Hill. 7 W. 3. Walker v. Freeby & Holmes.

See pl. 1.

11. *Trespass* for the taking of a horse. The defendant justifies under a judgment recovered against the plaintiff in the *hundred court* by a *taliter processum*, and does not set out the proceedings at large; and adjudged good, notwithstanding that the old books are to the contrary, upon the authority of a case between DOE AND PARMITER; Hill. 24 & 25 Car. 2. adjudged in point in B. R. in the time of Lord Hale, upon great debate. Ld. Raym. Rep. 80. East. 8 Will. 3. Mackareth v. Pollard.

For more of *Taliter Processum* in general, see other proper titles.

The sheriff often gave acquittances and tallies to the tenants, and yet nichiled them on the account; and upon complaint of the tenants, the king often issued out writs, whereby inquisitions were taken, and what persons the

1. 14 Edw. 2. ENACTS, That if sheriffs and other ministers cap. 1. which gather the debts of the king, and make * tallies and other acquittances to the debtors, and yet do not acquit them in the Exchequer, and of the same are impleaded in the Exchequer, and by favour are put to little issues, which they will rather lose than come to answer, the sheriff, &c. when he is impleaded in the Exchequer, and the great distress returned against him, and he comes not to answer, there shall go forth another writ of distress, in which shall be commanded that proclamation be made in the full county, that the defendant come at such a day, and acquit the debtor of the sum for which he made tally or acquittance, at which day if the defendant come not, and the writ be returned, and proclamation certified, he shall be holden for convict, and the debt levied of him, and damages awarded to the plaintiff, according to the discretion of the barons. And this statute shall extend as well to those which have been sheriffs, and

and other ministers that let to lease their bailiwicks, as to the sheriffs and other ministers, which hold their bailiwicks themselves. And by this statute no man shall be forbidden, but that he may complain of sheriffs and other ministers when they be found in the Exchequer, and that they shall answer there as has been used.

sheriff had received money from, which was nichiled at the Exchequer, and such tallies

were produced to the persons impanelled; and if the sheriffs were found guilty they were attached. The words of the writ are, quod veritatem talliar' delictarum scil't inquirat, & si delictores talliarum fuerint attincti tunc habeas corpora eorum coram baronibus, &c. But for the more effectual remedy of this grievance, the stat. de attinct. was made, 12 E. 2. Gilb. Hist. View of Exch. 94, 95. cap. 5.

Wingate mentions this statute as 13 E. 2. and Cay mentions it as 14 E. 2. which Ld. Ch. B. Gilbert mentions as 12 E. 2.

* When any man pays in money into the Exchequer, he pays the sum to the teller, and the teller makes a bill in parchment for the sum so paid, in which is the christian and surname of the party, his office, and the day of payment, and the sum so paid wrote in numeral letters; this bill is rolled up, and thrown down through a pipe into the tally court; then the tally-cutter prepares the tally, which is notched according to the sum mentioned in the bill, viz. a greater notch for (M) and a lesser notch for (C); a lesser notch for (X) and so a lesser notch for single pounds, and for shillings and pence; the tally is but slightly cut with the knife. Then the auditor of the receipt, who was anciently called the receptor talliar', writes a duplicate upon the wood of the tally, of the contents of the parchment bill, and the sum (which is writ in the numerical letters upon the bill, and is expressed by notches on the tally). Then the clerk of the pells enters the bill into his book, and the scriptor talliar' reads the tally; the clerk of the pells at the same time looking into his book to see that his entry and the tally agree together; and then the chamberlains strike the tally, that is, divide it into two, and the tally or the stock is given to the party, and the foil or counter-part is left with the chamberlains, and the bill is carried away and filed by the auditor of the receipt. Gilb. Hist. View of the Exch. 140, 141. cap. 9.

2. It appears in a case of debt, that where the king is indebted to a man, he may assign the party by the record to take the sum of a customer, and deliver to him a tally thereof; and there if the creditor shews the tally to the customer, the customer is thereby charged, if he has assets in his hands, or when assets come to his hands, he may have debt against the customer thereupon, naming him customer; and there it is a good plea for the customer to say, that at the time of the shewing of the tally, nor ever after, he had nothing in his hands; and there the tally need not be shewn in the court, nor upon the count, as upon debt upon an obligation; for the customer is not debtor by the tally only, but by the record by which it is assigned to the plaintiff, and by the shewing of the tally. Br. Taile de Exchequer, pl. 1. cites 27 H. 6. 9.

Br. Debt, pl. 17. cites S. C.

3. And if the tally be lost the creditor upon his oath shall have a new tally which is called an innovate, contra of an obligation; for there if he loses it, he loses his duty, and therefore this shall be shewn in the count, contra of the tally; for this is only to deliver to the customer to take allowance thereof upon his account, but the debt is due by the assignment in the record, and not by the tally; note the diversity. Br. Taile de Exchequer, pl. 1. cites 27 H. 6. 9.

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4. In the Exchequer it is the common course upon a tally for the customer to say, that he has nothing in his hands but 20s. and that B. shewed to him a tally of 20l. and one A. another, &c. and to those who first shew they are chargeable, &c. nota. Br. Taile de Exchequer, pl. 2. cites 9 E. 4. 12. per Pigot; and the same law per Chocke in the residue of the said case, fol. 14. upon several tallies shewn, and in pleading thereof it ought to be shewn what day and year it was shewn to him, and at what place.

De. Dette.
 221.
 cites S. C.

5. A tenth was granted to king R. 3. by the clergy payable at two days, by which the king assigned divers tallies thereof to his debtors, payable by the hands of the king's collectors thereof, which collectors were assigned by the clergy, and mesne between the two days king R. died. And it was held that the collectors upon the shewing of the tallies by the debtors are chargeable to them, and that the clergy after this are chargeable to the debtors, and that after this assignment and shewing of the tally, the king cannot pardon the clergy of the tenth; for it is altered into a debt before, and that it is not due to the king after the shewing of the tally; and that after this the old king, nor the new king, cannot have it, but the debtors. Br. Taile de Exchequer, pl. 5. cites 1 H. 7. 8.

For more of Tally of the Exchequer in general, see Acquittance(B), Prerogative, and other proper titles.

Taxes.

(A) How Construed.

1. **T**HE word taxes generally spoken with reference to a freehold; or where the subject matter will bear it, shall be intended parliamentary taxes, propter excellentiam. 2 Salk. 615. says, that this was laid down as a rule by Holt Ch. J. Hill. 9 W. 3. B. R. in case of Brewster v. Kidgell, and cited 34 H. 8. Quinzim, 9. but said that there are other taxes not parliamentary, as for repair of churches, commission of sewers; for any imposition which takes away part of the goods or rent is a tax, and cites 2 Inst. 532.

See the case
 of Brewster
 v. Kidgell
 at (D).

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2. If a tax be given by parliament, which was never known, or in esse before, a covenant that the lessee should pay all sum and sums of money that now is or shall be assessed or taxed for and in respect of the premises demised for chimney-money, church and poor, or visited houses, or otherwise above and besides the rent reserved, would not extend to such taxes; but if it had been worded thus (all taxes that should be hereafter imposed by parliament), all taxes whatsoever would be included. 11 Mod. 239. per Powel J. Trin. 8 Annæ. B. R. in case of Hopwood v. Barefoot.

(B) Liable, what and who.

See Prero-
gative,
(R. 5).

1. **A.** Having a *rent* payable half yearly out of a term, whereof about six years were to come, was content to *release it upon a bond* entered into to him, and conditioned *for payment of the like sum with the rent, and at the same times.* Per. Cur. it is equitable, taxes be *allowed*, in regard the money in the condition was intended between the parties to be put in lieu of the rent, which should have been chargeable with the assessment. Vent. 252. Hill. 25 & 26 Car. 2. B. R. Anon.

2. In trespass upon not guilty pleaded the question upon a special verdict was, whether a *new-built house* which had *never* been inhabited, nor any account of the chimnies thereof returned into the Exchequer, should pay the duty for chimnies? The whole Court was clear of opinion, that it should, for the words are, *every house (other than such as hereafter are excepted)* shall pay, and a new-built house is not excepted. Vent. 311. Trin. 29 Car. 2. B. R. Ironmonger's Company v. Nailer.

3. By an act of parliament for building new ships, and another for disbanding the army, *all lands, &c. annuities, offices (except military offices, and offices relating to the navy under the command of the high admiral), and all other real and personal estates*, were to be assessed equally by a pound rate. Upon a reference by the king to all the judges of England, the question was, *whether the commissioners of the customs, being constituted by letters patents, are taxable in the Tower-ward, where they execute this office, for their salaries of 1200l. per ann.?* It was insisted for the commissioners, that the word offices did not extend to them, and the words annuities, profits, and personal estates, do not make them taxable in the Tower-ward, for these words follow their persons: as for the word offices, it imports a stated and ordinary charge for ever; but this office is *pro hac vice tantum*, and the words (other real and personal estates) charge only such estates; but *per omnes justiciarios*, these words annuities, profits, and personal estates, do charge these salaries. It is true, this is not such an office for which an assise would lie, but the intent of the act was to charge every thing which was not excepted; and military offices are excepted, of which an assise will not lie, and yet they are called offices, and would have been charged if not excepted. 2 Jo. 220. Trin. 34 Car. 2. B. R. Sir Rich. Temple and the Mayor of London's case.

4. The Attorney-Gen. Treby, and Solicitor-Gen. Somers's answer to the queries sent them by the Lords Commissioners of the Treasury, 30th March 1692.

Qu. Whether *high-constables*, and those that have served the office of high-constable, are to be assessed as gentlemen by the poll?

Resp. We conceive, that the mete bearing the office of high-constable, *without being otherwise reputed*, owned or written gentlemen, doth not make the person liable.

Qu. Whether *grasiers, maltsters, horse-courfers, &c.* ought to be charged *as tradesmen*?

Resp. Grasiers, maltsters, and horse-courfers, being understood to be such as make the said employments their ordinary profession and way of livelihood, ought to be charged as tradesmen.

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Qu. The 4 quarterly payments are to be assessed together; if so, then what can be done with *servants upon their removals*, and how the assessments can be levied?

Resp. We conceive the best and most proper course will be to make four *distinct assessments*.

5. A. surrendered a copyhold estate to B.—*B. surrendered it back to A.* provided if B. paid not 100l. *per ann. to A. without any deductions* or charges, A. to re-enter, and the surrender to be void. The question was, whether parliamentary taxes are to be allowed out of it, this being neither properly a rent, annuity, nor interest money? 2 Vern. Rep. 306. pl. 296. Mich. 1693. *Lynes v. Brown.*

* Ibid. 371.
Arg. contra.

6. A *rent-charge* can be subject to no other but *parliamentary taxes*; it is *not* contributory to church, * poor, sewers, or highways. Arg. 5 Mod. 369. in case of *Brewster v. Kidgill.*

7. Per Cur. if a man's *estate* is of *such a nature*, as that the commissioners *cannot assess a certain tax* upon every man, as in the case of *common, &c.* they ought not to meddle with it. 11 Mod. 89. pl. 10. Trin. 5 Annæ, Anon. cites Hill. 7 Ann.

(C) In what Place.

1. **I**N the Exchequer upon a super, the question, upon the statute for imposing the tax of 4s. in the pound, arose upon the clause in one of the first acts, for taxing the *shares in the Company of the New River water*, which ordains that the shares in this company should be taxed *in the county where the owners inhabit*; and in the principal case, the defendant inhabited in one county, and was taxed in another, and therefore she refused to pay. And the Court was clear, that she ought to pay; for there is an interest vested in the king by the act, and if the *remedy* for collecting it, or the method for assessing it, *prove impracticable*, the duty being vested in the king, this *shall be levied by the aid and assistance of this Court*; and it was adjudged accordingly. But inasmuch that there was 1800l. and more returned upon the super, the Court declared that the defendant shall *not be charged* for the whole, but only for her own proportion. Skin. 642. Trin. 8 W. 3. B. R. the King v. Margaret Webster.

2. The *inhabitants* of one parish had common appendant in waste grounds which lay in another parish; and the question was, whether the commoner should pay taxes, and should be assessed in the parish

parish where the waste lay, or where his farm lay? And it was held that it should be where his farm lay; for it is incident, and will pass by the grant of the farm, &c. so that it is to be considered as part of the farm, and the farm to be taxed the higher. 1 Salk. 169. pl. 1. Mich. 6 W. & M. in B. R. the King v. Fox.

3. Trespass against the collectors of the land-tax; the plaintiff lived in *Middlesex*, and exercised the employment of a factor in *Smithfield*. The question was, whether he should be taxed where he lived, or where he followed his employment? Holt Ch. J. was of opinion, that he was not taxable by the commissioners of *Middlesex*; for by the very words of the act, he is to be taxed in the place where his office is exercised. But the other judges contra; for this is not an office which is local, but a *personal employment*, and the person is taxable where he lives, and the affirmative words of the act are directory: he is *taxable in either place*. 2 Salk. 616. pl. 2. Trin. 5 Ann. B. R. Trowell v. Elford.

(D) *Allowed or deducted, in what Cases.*

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1. IF a man leases his land for years rendering rent, and grants that he will discharge the tenant during the term of all charges arising upon the land, and after the parliament grants to the king the tenth part of the value of the land of every man; several held, that he shall not discharge the tenant of this. Otherwise if the tenth part of the issues of the land had been granted by parliament. Br. Grants, pl. 164. cites 17 E. 4. 6.

Br. Charge, pl. 47. cites S. C. and adds, and by several he shall discharge him; for the king may distrain upon the

land; quare inde, where the lease was before the grant by parliament. — Br. Covenant, pl. 30. cites S. C.

2. The plaintiff demised unto the defendant a house, rendering 10*l.* yearly, without any deduction or abatement for or in respect of any hearth-money, parish-duties, dues, taxes, and assessments already had, made, rated, taxed or assessed, or to be had, made, &c. at any time during the said term upon the plaintiff, by reason of the said house. Afterwards an act of parliament gives a tax, and enacts, that the landlord shall pay it; but there is a proviso, that it shall not extend to discharge any covenants or agreements made between landlords and tenants. It was insisted for the defendant, that the word parish shall extend to dues, duties, &c. and it shall not be intended of extraordinary charges laid by parliament, and said that *parish est verbum gubernans*. Ellis J. said, if the words do not extend to parliamentary taxes, they can have no signification; for hearth-money and parish-duties, &c. are to be paid by the tenant without such a covenant. But as to that point, whether or no this covenant was dispensed with by the act of parliament, the Court delivered no opinion, because they all agreed, that as the tender was pleaded

it was naught; and upon that point judgment was given for the plaintiff. Freem. Rep. 148, 149. pl. 169. Pasch. 1674. Marhal v. Wisdale.

3. If a lease be made for years *rendering rent free of all taxes, charges, and impositions whatsoever*, the word render makes a covenant, and the lessor is discharged from all land-taxes lately imposed by parliament, and long after the commencement of this lease; and the lessee must pay the whole rent, without any manner of deduction for any old or new charge, or imposition whatsoever. Adjudged, absente Holt Ch. J. Carth. 135. Pasch. 2 W & M. in B. R. Giles v. Hooper.

12 Mod. 54. S. C. Trin. 6 W. & M. says the lease was made in 1675, and the other justices as to this point held contra to Holt Ch. J.

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5 Mod. 368. S. C. and says, the confirmation of this grant was in 1652; and per Curiam, where taxes are mentioned (if the subject matter will allow it) it must be intended taxes by parliament, which are the most eminent, and that by an ordinance in force, when

4. Lessee covenanted to pay so much *rent clear of all taxes*; the defendant pleaded performance; the plaintiff replied, and assigned a breach in non-payment of so much for half a year's rent; the defendant rejoined, that he had paid so much in money, and so much in taxes, which being allowed, did amount to the whole rent; and upon demurrer, Holt Ch. J. held, that this covenant did not extend to parliamentary taxes for want of the word parliamentary; but the others contra; for all taxes include parliamentary. 1 Salk. 221. pl. 2. Trin. 5 W. & M. in B. R. Countess of Arran v. Crispe.

5. A. seized of lands in fee, by deed dated 1649, granted a *rent-charge* to one Brewster and his heirs, which deed was thus indorsed, that the rent was to be paid *clear of all taxes*; afterwards A. confirmed this grant, and covenanted to pay the rent-charge clear of all taxes. By the statute 3 W. & M. 4s. in the pound was laid on all lands, and power given to the tenants to deduct it, with a proviso not to alter any covenants or agreements of parties. The question was, whether the tenant could deduct for taxes? Per Cur. if this covenant * had been made in the year 1640, it would not have discharged the rent-charge, from the taxes imposed by this act, because there was no such parliamentary tax known or in being at that time; but because *there were such taxes in the year 1645*, which was before this grant, this covenant must for that reason be construed to extend to them, otherwise it would signify nothing. 1 Salk. 198. pl. 4. Hill. 9 W. 3. B. R. Brewster v. Kidgell.

this covenant was made, the rent was as much rated as the land. But they were of opinion that this was only a personal covenant, and not a covenant running with the land.——Comb. 424. Trin. 9 W. 1. S. C. adjournatur.——Ibid. 466. Hill. 10 W. 3. B. R. the resolution of the Court was delivered by Holt Ch. J. accordingly, and because taxes have a virtual existence in the constitution of the government before any act is made for the raising of them.——Carth. 438. S. C. accordingly.——Ld. Raym. Rep. 317. S. C. accordingly.——12 Mod. 170. S. C. and the resolution of the Court delivered by Holt Ch. J. accordingly. But Holt said, he could not see how the plaintiff can have his judgment; for if this covenant should charge the land it would be higher than a warrantia chartæ, which only affects the land, from the judgment therein given. But the other three judges thought that this covenant might charge the land, being in nature of a grant, or at least a declaration going along with the grant, shewing in what manner the thing granted should be taken, and reckoned the indorsement as part of the deed, and so judgment was given for the plaintiff.

If a tax had been given for rebuilding St. Paul's church, this would have been out of the statute. Per Holt Ch. J. in delivering the opinion of the Court. Carth. 439. in case of Brewster v. Kidgell.——Ld. Raym. Rep. 322. S. P. per Holt in S. C.

6. Devise of lands on condition to *pay 20,000l. by 1000l. a year for 20 years, till 20,000l. paid.* The devisee entered for non-payment. It was decreed, *inter alia*, that here is to be *no deduction* of any taxes, because it is not to issue nor arise from the lands, but is given as a *sum in gross*, secured by entry on the lands for non-payment. 1 Salk. 156. 1707. in Canc. Grimston v. Ld. Bruce. 2 Vern. 594.
S. C. but
not S. P.

7. In a trial before Holt Ch. J. in an action of *covenant*, this case was reserved for the opinion of the Court. A *building lease* was made in 1672, by A. for 61 years, in which there was this covenant, *that the lessee should pay all sum and sums of money that now is or shall be assessed or taxed for, and in respect of the premises demised as aforesaid for chimney-money, church, and poor, or visited houses, or otherwise, above and besides the rent reserved thereupon; in 1698, the lessee surrenders this lease, and a new lease was made upon the foot of the former, in which there was the same covenant as in the former lease.* After several arguments at bar, adjudged that lessee was not liable to pay the land tax. 11 Mod. 237. &c. Trin. 8 Ann. B. R. Hopwood v. Barefoot.

8. Holt Ch. J. said, that it was likewise adjudged, that where A. made a lease, and covenanted to discharge the lessee of all *burdens and charges*, (there being no tax at that time, but afterwards a 15th being granted by parliament), the tenant was *dis-trained* for it; and this was adjudged within the covenant, because taxes are always a charge in ** viris*. 11 Mod. 240. in case of Hopwood v. Barefoot. * *Quære*.

9. A. *covenants to pay an annuity* to B.—A. shall not deduct for taxes; for the charge is on the person of the covenantor, and not on the land. 2 Salk. 616. pl. 3. Mich. 8 Annæ, in Chancery. Robinson v. Stephens. G. Equ.
Rep. 141.
Legat v.
Shewell.

10. If H. having a term for years, *devises an annuity* to J. S. and his heirs, there can be no deduction for taxes. 2 Salk. 616. Mich. 8. Annæ, in Canc. Robinson v. Stephens.

11. If H. grants *annuity* to J. S. and after *secures it out of a real estate*, there shall be no deduction for taxes; for the subsequent security cannot lessen the effect of his former grant, which in its creation was tax-free. Per Cowper, Lord Chan. 2 Salk. 616. Mich. 8 Ann. in Chancery, Robinson v. Stevens. G. Equ.
Rep. 142.
cites the
case of
Green v.
Green.

12. Lessor *covenants* with lessee *to pay all taxes on the lands demised.* Lessee brought covenant, and assigned for breach the not paying the rates to the church and poor. Upon demurrer it was objected, that those rates are personal charges, and not on the land; and for that reason the defendant had judgment. 8 Mod. 314. Mich. 11 Geo. 1. 1725. Theed v. Starkey. [162]

(E) Allowed. *How much.*

A. seised of a *rectory* of 120l. per ann. charged with a *fee-farm rent* of 26l. per ann. was taxed for all the rectory only according to the rate of 25l. per ann. for taxes; he retains 4s. Comb. 483.
Trin. 10 W.
3 in the Ex-
chequer.

Sherington v. Andrews, S. C.— So in case of a quit rent. And a bill brought by the lord of the manor was dismissed with costs. But the matter having been examined and ascertained by the commissioners of the land-tax, Lord Cowper would not re-examine it; but declared his opinion, that the payment should be only in proportion. *Wms.'s Rep.* 328. Mich. 1716. *Brockman v. Honeywood*. 4s. per pound for the *fee-farm rent*, which was much more than he really paid. The whole matter appearing in the Exchequer, where a bill was brought, it was decreed, that the owner of the fee-farm rent should allow only in proportion to what was paid. 12 Mod. 171. Hill. 9 W. 3. cited as one *Sherington's case*.

Comb. 483. S. C.

2. P. seised of land, and Sir J. W. of a *fee-farm* issuing out of it, paid taxes only after the rate of 1s. 3d. per pound, and retained for the fee-farm after the rate of 4s. at which the land-tax was. On which Sir J. W. owner of the fee-farm rent, brought his bill in the Exchequer, and prayed, that P. should set forth the value of the land, and what rent he received, and what he had paid for taxes: to which bill P. demurred, and the demurrer allowed, notwithstanding the above case of *Sherington* was cited; the whole matter there appearing, and this being on a demurrer, which was made the difference. 12 Mod. 171. cites it as one *Pickering's case*.

(F) Collectors. Their Power. And how punished for Misdemeanors.

1. A Warrant given to the collectors of the king's tax was, to break open doors, &c. in case of opposition, &c. and this warrant was granted before any default, which ought not to be. And Holt Ch. J. said, strictly it was so; but the practice having been, in this case of taxes, to grant such a conditional warrant to distrain, *communis error facit jus*. *Cumb.* 342. Trin. 7 W. 3. B. R. *East India Company v. Skinner & al'*.

2. The collectors of the King's tax may *distrain money* as well as goods; and though they take more than was due, yet it sufficeth that they return the overplus, when they have sold it, &c. Per Holt. *Cumb.* 342. Trin. 7 W. 3. in case of *East India Company v. Skinner & al'*.

[163] 3. The defendants were found guilty of misdemeanor, for that, being assessors and collectors of the public taxes in such a parish, they assessed some too high, and omitted others in their books; and yet levied the money on them, and put it in their own pockets. On their coming to receive judgment, it was moved, that no corporal punishment might be inflicted, because the crime was not of an infamous nature. But they were adjudged to the pillory in the county where the crime was committed; and that the marshal should carry them down, and a writ should go to the sheriff to assist him in the execution. 6 Mod. 306. Mich. 3 Annæ, B. R. *the Queen v. Buck & Hale*.

4. Upon the motion of Sir Peter King, recorder of London, the court granted a *mandamus* to the commissioners of the land-tax for Barnwell, to tax the lands there equally. 11 Mod. 206. pl. 6. Hill.

Hill 7 Ann. in B. R. Queen v. the Commissioners of the Land-Tax for Barnwell.

For more of Taxes in general, see Bridges, Poor, and other proper titles.

Tayle.

(A) Tayle. Of what Thing to another.

Fol. 499.

- [1.] **I**F a mesne gives the mesnalty in tayle, the law will create a tenure between the donee and donor. 1 H. 4. 3. b.] See Tenure (B) pl. 4 & (G) pl. 5.
S. C.—And of what things an estate-tail may be, see estates (S).

(B) What Persons may make Estate-Tayle, and to whom.

- [1.] **A.** Acknowledged all his right [by fine] to B. who rendered to A. for life, remainder to him in tail; it is a good tale, without donor besides himself. 42 E. 3. 5. b. (But it seems it is not law.)] If A. levy a fine, remainder in tail to himself, remainder to B. in fee, this remainder in tail is void; for he cannot give to himself. Br. Fines, pl. 113. cites 14 H. 4. 31. & 42 E. 3. 5. where he says it is not adjudged; and yet he says it seems to be a void remainder. —A man cannot by fine, by way of remainder, reserve a less estate to himself than fee. And therefore if A. acknowledge a fine to B. in fee, and he renders to A. in tail, the remainder to himself for life, this remainder is void; for A. had fee-simple before. [West's Symb. f. 30. cites 24 E. 3. 28. 14 H. 4. 31. He who is seised in fee, and gives, cannot reserve a remainder to himself in tail, the fee-simple never being out of him. Br. Reservation, pl. 41. cites 1 H. 5. 8. A man cannot reserve a less estate to himself than he had before. Br. Reservation, pl. 19. cites 38 H. 6. 38.]

(C) At what Time [he may bar Estate-Taille].

- [1.] [2.] **AFTER** issue, he may bar the estate-taille by alienation, or forfeiture by treason. 7 H. 4. 46. pl. 6.] See Estate, (A. a) S.P. See pl. 2 paragr. 4. in the notes there.

2. 13 Ed. 1. cap. 1. Concerning * lands that many times are given upon condition, that is, to wit, where any gives his land to any man and his wife, and † to the heirs begotten of the bodies of the same man and his wife, with such ‡ condition expressed, that if the same man and his wife die without heirs of their bodies between them begotten, the land so given shall revert to the giver or his heir. [164] Before this statute, all inheritances were estates in fee, viz. either fee-simple absolute, or fee-conditional.

or a qualified fee; whereof you may also read in the first part of the Institutes, c. 1. [13] And

tenant of lands intailed had, before this statute, a fee-simple conditional subsequent; for albeit Britton, who wrote before this statute, says, that if any purchase to him and his wife, and to the heirs of them lawfully begotten, the donees have presently but an estate of freehold for the term of their lives, and the fee accrues to their issue, &c. taking the condition to be precedent; yet had the donees at the common law a fee-simple conditional presently by the gift. For if lands had been given to a man, and the heirs of his body issuing, and before issue he had, before this statute, made a feoffment in fee, the donor should not have entered for the forfeiture, but this feoffment had barred the issue had afterwards; which proves, that he presently by the gift had a fee-simple conditional, and this agrees with the authority of Littleton, ubi supra. 2 Inst. 333.

If donee in tail at common law had *aliened before any issue had, and after had issue*, this alienation had barred the issue, because he claimed a fee-simple; yet if *that issue died without issue*, the donor might re-enter, for that he aliened before any issue, at what time he had no power to alien, to bar the possibility of the donor. But if *some tenant in tail had taken husband, and had issue, and the husband and wife had aliened in fee by deed before the statute*, yet the issue might have had a formedon in descender, for the alienation was not lawful; but otherwise it is, if it had been by fine. And these things, though they seem ancient, are necessary notwithstanding to be known, as well for knowledge of the common law as for annuities, and such like inheritances, as cannot be intailed within the said statute, and therefore remain at the common law. If the king, before the statute of donis conditionalibus, had made a gift to a man, and to the heirs of his body begotten, the donee, *post prolem suscitam, might have aliened as well as in the case of a common person. But if the donee had no issue, and before the statute had aliened with warranty, and died, and the warranty had descended upon the king*, this should not have bound the king of his reversion, without assents; but otherwise it was in the case of a common person. Of the other side, if *lands had been given to the king, and to the heirs of his body, he could not before issue have aliened in fee, but only to have barred his issue as a common person might have done; but not to have barred the reversion, for that should have been a wrong in the case of a subject, and the king's prerogative cannot alter his case, nor make it greater than the donor gave unto him; and it is a maxim in law, that the king can do no wrong. Co. Litt. 19. a. b.*

Now for the better understanding of this act, seeing that the estate was conditional at the common law, it is necessary to be known when the condition was performed, and to what purposes. If the donee had issue, he had not thereby a fee-simple absolute, for if after he had died without issue, the donor should have entered as in his reverter. But *after issue had the condition was performed to this purpose, that he might have aliened, and thereby have barred the donor and his heirs from all possibility of reverter for default of issue; for the heirs of his body (he having a fee conditional) might have barred them as well before issue (as has been said) as after. 2 Inst. 333.*—This is said to have been a common error, that the donee *post prolem suscitam habuit potestatem alienandi*; but being taken and ensued as common law, this statute was made to reform the abuse, and restore the common law to its right course, and restore to the donor the observation of his intent, and so is made in restitution, Pl. C. 251. b. 252. a. in case of Willion v. Lord Barkley.

¶ Co. Litt. 19. a. S. P.

* In 2 Inst. Lord Coke for the word (*lands*) uses the word (*tenements*); and in his Co. Litt. 19. b. says, the word (*tenement*) is the only word which this statute uses.

† For to a gift in tail made, this word (*heirs*) is requisite, unless it be in case of a last will, &c. 2 Inst. 334.

‡ If this condition expressed had not been added, the very gift would have implied so much. 2 Inst. 334.

By this clause it appears that an inheritance passes by these words (*frank-marriage*). 2 Inst. 334.——Lands were given before the statute in frank-marriage, and the donees had issue, and died; and after the issue died without issue. It was adjudged, that his collateral issue shall not inherit, but the donor shall re-enter. So note, that the heir in tail had no fee-simple absolute at the common law, though there were divers descents. Co. Litt. 19. a.

§ [165]

This act having put 2 examples of estates tail special, viz. the first *In case also where one gives land to another, and the heirs of his body issuing; it seemed very hard, and yet seems, to the givers and their heirs, that their will being expressed in the gift, was not heretofore, nor yet is, observed.*

to a man and his wife, and to the heirs of their bodies; the 2d of a gift in frank-marriage, a § special case, and a special estate in tail; here he puts a case of an estate tail general, not that the makers of this statute meant to enumerate all the forms of estates in tail, but to put these as examples, so as all manner of estates tail, general, or special, are within the purview of this act. 2 Inst. 334.

*In all the cases aforesaid, after issue begotten and born betwixen them (to whom the lands were given under such condition) heretofore such feoffees had * power to alien the land so given, † and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift.*

That is to say, by fine, feoffment, release, or confirmation. 2 Inst. 334.

* But the tenant in tail had not only potestatem alienandi, but forisfaciendi, &c. also; for if after issue had, he had been attainted of treason or felony, the land intailed had been forfeited, and thereby the donee barred of the possibility of reverter, and forisfacere is alienum facere; and therefore in this act is included in these words, potestatem alienandi. And so might the tenant in tail, before the making of this act, [after issue had. Co. Litt. 19. a.] have charged the land with rent, common, or the like, to have bound his issue; but by this act he is restrained as well to charge as to alien. 2 Inst. 334.

But the having of issue before this act did not alter the course of descent. 2 Inst. 334.—Co. Litt. 19. a. S. P. For if the donee had issue, and died, and the land descended to his issue, yet if that issue had died (without any alienation made) without issue, his collateral heir should not have inherited; because he was not within the form of the gift, viz. heir of the body of the donee.

† Hereby it appears, that there were 2 mischiefs before this act, viz. 1st, The disinheriton of the issues in tail. 2dly, That it was contra voluntatem donatorum, & contra formam in dono expressam; for the donor and his heirs were barred of the possibility of reverter; and both these were wrongs for which at the common law there lay no remedy; for disinheritons, and breaking the express will and intention of the donor, are wrongs which this act does remedy. 2 Inst. 334.—Pl. C. 247. a. S. P. Arg. in case of Willion v. Ld. Berkley.

And further, when the issue of such feoffee is failing, the land so given ought to return to the giver, or his heir, ‡ by form of the gift expressed in the deed, though the issue (if any were) had died.

‡ It was said before, contra formam in dono expressam; so

as whether the estate was made by deed, or without deed, it is all one to the intention of this act; and the most usual gifts in tail being of inheritance, were by deed. 2 Inst. 334.

Yet by the deed and feoffment of them (to whom land was so given upon condition) the donors have heretofore been barred of their reversion, which was directly repugnant to the form of the gift.

S. 2. Wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, has ordained, that the || will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed.

|| Upon these 2 branches, viz. that the will of the donor should be observed,

and that the donee should not have power to alien, the judges by a threefold construction did not only remedy all the said former mischiefs, but prevent all others that might arise, viz.

1st, Therefore in execution of the will of the donor, and that he should have no power to alien either lands that lay in livery, or tenements that lay in grant, they adjudged that the donee should not have a fee-simple, but divided the estates, and created a particular estate in the donee, and a reversion in the donor; so as where the donee had a fee-simple before, by this act he had but an estate tail; and where the donor had but a possibility before, which after issue might be barred at the pleasure of the donee, now by construction upon this act the donor had the fee-simple expectant upon the estate tail, which we call a reversion; so as by this division of the estates, the donee after issue, or before, could not bar or charge his issue, nor, for default of issue, the donor or his heirs, either by alienation, forfeiture, or any charge whatsoever.

The 2d construction was, that no lineal warranty should bar the issue in tail, unless there were § assets descended in fee-simple from the same ancestor; but a collateral warranty made by a collateral ancestor, should bar the issue in tail without assets; for that warranty is not restrained by this act; and so likewise the collateral warranty of the donee shall bar the donor, and is not restrained by this act, as well as the warranty of the donor shall bar the donee, and is not restrained by this act.

The 3d construction was, that albeit tenant in tail was restrained from power of alienation, yet of lands and tenements, that lay in livery, his fine or feoffment should work a discontinuance, and drive the issue in tail to his action; for seeing he had an estate of inheritance, the judges compared it to this case, where a man was seised in the right of his wife, or a bishop in the right of his bishoprick, or an abbot in the right of his monastery, et sic in similibus, and of inheritances that lay in grant, as of rents, advowsons, and the like, tenant in tail could not make any discontinuance, no more than the others before recited might do, which construction was made according to the rule and reason of the common law in other like cases. 2 Inst. 335.

§ See Litt. f. 712. and the notes thereupon. Co. Litt. 374. b.

* It was adjudged by Beresford, that the issues in tail should not alien more than they to

* So that they, to whom the land was given under such condition, shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver, or his heirs (if issue fail) where [so] as there is no issue at all, or if any issue be, and fail by death, or heir of the body of such issue failing.

whom the land was given, and that was the intent of the makers of this act; and it was but their negligence that it was omitted, as there it is said. In this case, by way of purchase, the land is given to the donee, and by way of limitation to the issues in tail; and therefore by a benign interpretation, the purview of this act extends to the issues in tail. 2 Inst. 335, 336.

Upon these words several constructions have been made; as if tenant in tail makes a feoffment in fee, this makes a discontinuance, and is voidable by action only. And that if he grants in fee, rent, or other thing lying in grant, and whereof he is seised in tail, it is no discontinuance, but is voidable by claim, or by action; that if he grants rent out of the land, the rent absolutely determines by his death; that a release to his disseisor is no discontinuance, but the estate is voidable by entry or action of the issue; but release with warranty is discontinuance, if the issue be heir to the warranty; that if he makes a lease for his own life, or years, and releases to lessee and his heirs, this is no discontinuance, though it be with warranty; that if he makes lease for life, and afterwards grants the reversion in fee, this is no discontinuance of the fee, unless it be executed in the life of the grantor. The reason of which, and many other constructions made upon these words, is, that the judges have construed them according to the rule and reason of the common law; for at common law, if a bishop, abbot, &c. or baron seised in right of his wife, had made a feoffment in fee, this had been a discontinuance, and put the successor or feme to their action, in regard to the favour which the law gave to an estate which passed by livery and seisin, and because it is public and notorious, and formerly was the common assurance of land; but if they had been seised of a rent, or other thing lying in grant, and had granted it in fee, this had been no discontinuance, and yet it was not absolutely determined by death of the bishop, abbot, &c. or baron; for the successor or feme had election to determine it, and make it voidable either by bringing a writ, or by claim upon the land; but if the rent had been granted by them de novo, it had been absolutely void by their death. So, if they had released to a disseisor, it had been no discontinuance; and if they had leased for years, and released to the lessee and his heirs, this had not absolutely determined by their death, but had been voidable, or void, at the election of the successor or feme. But had they made lease for life, and after granted the reversion in fee, and the lessee for life had died, living the bishop, &c. or baron, this had been a discontinuance; otherwise had the lessee survived the bishop, &c. or baron. 3 Rep. 85. b. Pasch. 44. Eliz. a nota of the reporter in the case of fines. — See Co. Litt. 327. b.

Grant by tenant in tail to hold without impeachment of waste, with assets descended, is no bar against the issue in tail; for the statute of Gloucester speaks only of warranty and assets, and the statute of Westm. 2. cap. 1. mentions quod non habeat potestatem alienandi, yet this is intended of all things which may turn in disinheritation of the issue. Br. Tail & Dones, &c. pl. 13. cites 38 E. 3. 23.

† These are but consequences to the words of the purview, and are but explanatory, and not of substance, and might well have been omitted. 2 Inst. 336.

Neither shall the † 2d husband of any such woman, from henceforth have any thing in the land so given upon condition, after the death of his wife, by the law of England, nor the issue of the 2d husband and wife shall † succeed in the inheritance, but immediately after the death of the husband and wife, (to whom the land was so given,) it shall come to their issue, or return unto the giver, or his heir, as before is said.

Yet was it adjudged, soon after the making of this act, that where lands were given in frank-marriage, and the husband died, and the wife took another husband, and had issue before this act, that the husband should be tenant by the curtesie; and the principal reason was upon this branch of the statute (nec habeat de cætero secundus vir, &c.) for that this restraint proved, as there it is said, that the law before was, that he should be tenant by the curtesie; and yet, without question, the issue should not inherit that land. 2 Inst. 336.

‡ In ancient time, if land had been given to J. S. and his successors, he had had a fee-simple; but otherwise it is at this day. 2 Inst. 336.

¶ Hereby it appeared that a for-medon in the descender lay not at the common law, but was given by this act, and the form of the writ is here set down. 2 Inst. 336.

S. 3. ¶ And forasmuch as in a new case new remedy must be provided, this manner of writ shall be granted to the party that will purchase it.

Pracipe

Præcipe A. quod iuste, &c. reddat E. manerium de F. cum suis pertinentiis, quod C. dedit tali viro, & tali mulieri, & heredibus de ipsis viro & muliere exeuntibus.

Here is the form of the formedon in the descender set down; and therefore this statute need not be recited, nor any statute which gives the form of the writ.

Or thus.

*Quod C. dedit tali viro, in liberum maritagium cum tali muliere, & quod post mortem prædictorum viri & mulieris, prædicto B. filio eorundem * viri & mulieris descendere debeat per formam donationis prædictæ, ut dicit, &c. Vel, quod C. dedit tali & heredibus de corpore suo exeuntibus, & quod post mortem illius talis prædicto B. filio prædicti talis descendere debeat per formam. &c.*

2 Inst. 336. † The formedon in reverter did

S. 4. † The writ whereby the giver shall recover, (when issue fails,) is common enough in the Chancery.

lie at the common law, but not a formedon in remainder upon an estate tail, because it was a fee-simple conditional, whereupon no remainder could be limited at the common law; but after this statute a remainder may be limited upon an estate tail, in respect of the division of the estates. 2 Inst. 336.

* [167]

† And it is to wit, that this statute shall hold place touching alienation of land contrary to the form of the gift hereafter to be made, and shall not extend to gifts made before.

† This clause ought to receive a two-fold interpretation.

1. That (ad dona prius facta) must be intended of feoffments or alienations made by the donee or his issues, and not to gifts made by the donor, for to them this act does extend. 2 Inst. 336.

2. Dona prius facta, that is, post prolem suscitata, for then the alienation by the tenant in tail, or his issues, was good in law; so as (dona) here are to be intended lawful gifts, and made in due manner, and such as could not be avoided; for law allows no wrong. 2 Inst. 336.

And ¶ if a fine be levied hereafter upon such lands, it shall be void in the law.

¶ This act does not make the

fine void, but ipso jure fit nullus, that is, it shall not bind the right; yet it shall (as has been said) make a discontinuance. 2 Inst. 336.

But now by the statutes of 4 H. 7. cap. 24. & 32 H. 8. cap. 34. a fine levied with proclamation does bar the issues in tail; but a fine without proclamation is a discontinuance only, and no bar. 2 Inst. 336, 337.

Neither shall the heirs, or such as the reversion belongs unto, though they be of full age, within England and out of prison, need to make their claim.

Here is now compos mentis left out, and so is a feme covert.

2 Inst. 337. — Hereby it may be gathered (as the law was) that a fine at the common law did not bind a stranger that was within age, in prison, or beyond the seas. 2 Inst. 337.

(D) Issue in Tail. Bound by Acceptance or Agreement.

1. **T**ENANT in tail granted rent, and died, the issue paid the rent, and made a feoffment of the land, and retook in fee, yet he shall hold discharged; for the rent was void by the death of the grantor, and the payment by the heir will not make it good. Contrary of a lease by the tenant in tail, and the heir accepts the rent; for the lease was only voidable. Br. Grants, pl. 145. cites 21 H. 6. 25.

S. P. Br. Barre, pl. 27. cites 21 H. 6. 24. And upon acceptance of the rent, there is no difference where it is accepted in pais, and where he avows for it in a court of record; for the substance is in the one case and the other,

in pais, and where he avows for it in a court of record; for the substance is in the one

other, that where he accepts it, or demands it, he thereby affirms the lease or discontinuance; per Newton. For a thing void or determined cannot be made good by payment, but must have a new creation.

Poph. 112.

Holme v.

Gee S. C.

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not bar the

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tail in the

father (as a

release of

right should

do) but this

acceptance

shall only

foreclose him of his action to demand the land during his life, and therefore the right, which the father had, being barred by the fine, the son is without remedy; for he shall never have remedy on a fine levied in his father's time, the five years after the proclamation being past, unless only where the right begins first to be a right in the son, and not where there was a right in the father; and so they thought the judgment is to be affirmed. And they seemed further that payment by him, who had nothing in the land at the time of payment, shall make no conclusion to him that accepts it, because this payment would be as none in law.

Tenant in tail made *feoffment in fee to the use of himself and his heirs*, and after made a lease for years rendering rent and died; the issue accepted the rent. And by the opinion of all the justices the acceptances does *not confirm the lease*, because the issue was remitted to the estate tail by descent, and so the lease was utterly void that was made by the father, being then tenant in fee-simple. Mo. 846. pl. 1143. Mich. 13 Jac. B. R. Anon.

* [168]

2. Grandfather, father, and son. The grandfather being tenant in tail by indenture makes *feoffment in fee, rendering rent to him and his heirs*, and dies. The father accepts the rent; the feoffee levies a *fine with proclamation, 5 years past*, and then the father dies. The point was, whether the acceptance of the rent by the father had extinguished his right to the entail, or whether it is an estoppel only; for if he is only estopped, then, he having a right at the time the fine was levied, * and the five years incurring in his time, the son was barred; but if he had extinguished his interest, then the son, being the first to whom the right came after the fine levied, is not barred by the five years incurred in the life of the father. It was adjudged per Walmley and Clench J. at Lancaster assises, that the issue was barred. But the Court here thought that he is not barred, because the *acceptance is conclusion only, and does not extinguish the right*. Mo. 301. pl. 449. Pasch. 33 Eliz. Hulme v. Jee, alias Ice.

3. Tenant in tail agreed to make a conveyance, but died before it was perfected, and was in contempt for the not doing it. The issue in tail *accepted the satisfaction* agreed to be given for the conveyance to have been made by the tenant in tail. By this acceptance he has made it his own agreement, and shall be bound by it, and decreed accordingly. Chan. Cases, 172. Trin. 22 Car. 2. Rofs v. Rofs.

4. Tenant in tail of a rent grants it in fee, it is void by his death; but if the issue affirms it to be good, and brings a form-don, he may be barred by warranty. Per Holt Ch. J. 12 Mod. 361. Pasch. 12 W. 3. in case of Pullen v. Purbeck.

(E) Equity. *Agreement of Tenant in Tail carried Execution against the Issue.*

TENANT in tail made a mortgage without levying a fine, and entered into a *covenant for further assurance* and died. Bridgman K. would not compel the issue to make the assurance good, though the father might have done it by suffering a recovery.

recovery. Lev. 238. Pasch. 20 Car. 2. in Canc. Jenkins v. Keymis.

2. *Covenant by tenant in tail to levy a fine upon a valuable consideration, and a decree that he shall do so, binds the issue in tail.* S. C. cited 2 Vent. 350. Hill. 32 & Chan. Cases, 294. Mich. 28 Car. 2. Hill v. Carr. 33 Car. 2. in case of

Sayle v. Freeland. But Ld. Chancellor said, he would not supersede fines and recoveries; but where a man was only tenant in tail in equity, there this court shall decree such a disposition good; for a trust and equitable interest is a treasure of their own, and therefore disposable by their rule, otherwise where the entail was of an estate in the land.

Where a tenant in tail sold the lands at a full value, and received the consideration money, and had covenanted to levy a fine, and a bill being brought to enforce him, he was decreed to do it, yet he dying (though in prison, in contempt for not performing the decree) the issue in tail could not be bound by it. 4 Vern. 306. Arg. cites it as the case of Weale v. Lower. — S. C. cited per Ld. C. Macclisfield. Williams's Rep. 720. in case of Frederick v. Frederick. — S. P. cited Arg. 9 Mod. 16. in Lady Coventry's case. — S. P. Chanc. Proc. 278. in case of Powel v. Powel. — G. Equ. R. 164. cites the case of Sangon v. Williams.

So where there was a covenant and no decree upon it, and he acknowledged a fine, but died before it was perfected; equity would not supply this defect against the issue. 2 Vern. 3. Trin. 1686. Wharton v. Wharton.

So where tenant in tail mortgaged the land, and on a bill in this court was decreed to suffer a common recovery, but he died in contempt of the court for not performing the decree, the Court would not carry the decree into execution against the heir in tail. Cited Arg. 9 Mod. 18. And by the Judges assents that case was admitted; but they said, the reason may be, that the heir, after the death of his ancestor, was in by the statute de donis, which this Court could not control. But if the ancestor had been cesty que trust in tail, his heir would have been bound by such ancestor's lien; because in that case he would not have been in by the statute. 9 Mod. 19. in case of Coventry v. Coventry. — This is the case of WEALE v. LOWER, cited 2 Vern. 306. in case of Fox v. Crane and Wright.

Bare articles shall be a bar to an entail of an equity; per Cur. 2 Vern. 226. pl. 205. Pasch. 1607. in case of Baker v. Bailly. — Where an entail is only of a trust, it is not within the statute de donis; and so a fine or recovery is not necessary, but is alienable by any other conveyance made by him that has an estate of inheritance in the trust. Arg. and decreed accordingly, that a scotment by cesty que trust and trustees barred such estate. 2 Vern. 344. pl. 318. Hill. 1677. Bowater v. Elly.

Those cases in which the court will not compel the execution of powers, are where it would be against the will of the donor, that they should be executed. Arg. 9 Mod. 16. in Lady Coventry's case.

* [169]

3. The mother agrees to give her son other lands in lieu of lands intailed, and by will disposes of the intailed lands to her daughter, takes bond from her son to permit and suffer the intailed lands to be enjoyed, as she by will had devised them; the son dies, leaving the defendant his son an infant, who brought an ejectment for the intailed lands. The plaintiff could not sue the bond against the defendant, being an infant. Per Cur. the infant being in possession of the lands that came in recompence, we will at present only quiet the plaintiff's possession in the intailed lands, until 6 months after the infant comes of age, and then he may shew cause if he thinks fit. 2 Vern. 232, 233. pl. 212. Trin. 1691. Thomas v. Gyles.

4. Partition between tenants in tail, though but by parcel, was decreed to bind the issue. 2 Vern. 232. cites the case of Burton v. Jeux, and the like in the case of Rose v. Rose.

5. Tenant in tail covenants to settle a jointure: though he might have done it by fine and recovery, yet if he dies without doing it, a court of equity cannot relieve and decree a jointure. Arg. 2 Vern. 380. in case of Lady Clifford v. the Earl of Burlington and Ld. Clifford.

And where a power was reserved to him to settle a jointure, and he covenants to settle, but

does not execute it at all, there may be some reason for a court of equity, yet to enforce the execution thereof;

thereof; but where it is executed in any part, though not strictly performed, it is the standing rule of this Court to make it good. And cited several cases where articles had been carried into execution against remainder-men, and particularly the case of *Ld. Burlington v. Clifford*; and it was agreed by the other side to be true, that in the *Ld. Burlington's* case there was a general covenant, but that it did not rest there; for he settled what he pretended was 1000 l. a year, according to the articles, which was afterwards found to be of less value, and appeared so by the defendant's answer. 9 Mod. 16, 17. Arg. in the case of *Ld. and Lady Coventry*.

6. If tenant in tail, having a *power to make leases* for 3 lives, covenants to make such a lease, and dies before execution; the Court will carry this into execution though they would not *a sale*. Arg. 10 Mod. 469. in case of *Coventry v. Coventry*.

(F) Equity. Agreement of *Tenant for Life* carried into Execution against the Issue in Tail.

[170] AN agreement was made by articles between a lord of a manor who was only a *tenant for life*, and certain tenants of the manor who were likewise tenants for life only by settlements made precedent to the articles, which were *for settling heriots and stinting of common*, was confirmed by decree. Upon a bill to revive the decree, it was objected that this agreement could in no sort bind on the one hand or the other the persons, who upon the respective deaths of the tenants for life, became tenants in tail. But the Master of the Rolls was of opinion, that these articles tending to settle the *customs* of the manor, which were *immemorial*, and before the statute de donis, and for stinting the common and preventing suits, ought to bind the issue in tail, though made only by tenant for life; and he would not presume that the tenant in possession would do any thing in prejudice of the tenants right; and decreed that the former decree should be confirmed, and revived, and executed. Quære. Vern. 426, 427. pl. 401. Hill. 1686. In *Curia Canc. Dunn v. Allen*.

(G) Equity. Creditors relieved against the Issue in Tail. In what Cases.

1. THE husband in consideration of his wife's joining with him in a fine, and parting with her jointure of 40 l. per ann. gives her trustee a bond to settle other lands of 40 l. per ann. on the wife for life, remainder to the heirs of his body by her. The husband being indebted in other bonds dies intestate, and the wife takes administration, and confesses judgment to her trustee; on a bill by another bond-creditor decreed the wife's bond should be allowed, and stand good so far as to secure 40 l. per ann. to the wife for life; but as to the remainder to the children, or any settlement to be made for them, the Court took it, that upon the wording of the condition of the bond, the husband was to have been tenant in tail, and might have barred such settlement, if made,

made, as to the children, and therefore as against the plaintiff the defendant must have a satisfaction prior to him, but as to the children he must be preferred; and decreed it accordingly. 2 Vern. 220, 221. pl. 201. Pasch. 1691. Bottle v. Eripp & al.

2. Trustees in a marriage settlement for preserving contingent remainders, the marriage having been six years since (there being no issue) are decreed to join in a sale, the settlement being only of an equity of redemption, and the wife consenting to the sale. 2 Vern. 303. pl. 294. Mich. 1693. Platt v. Sprigg.

3. Where a settlement on marriage is made in tail of an estate mortgaged, if mortgagee foreclose the husband and wife, it will bind, though issue should be born afterwards. 2 Vern. 304. in case of Platt v. Sprigg.

4. A. mortgages land to B. for 1000 years, and afterwards settles it on marriage to himself for life, then to his wife for life, and then to the heirs of his body on the body of the wife, and afterwards mortgages again the same lands to C. and makes oath that the lands were free from incumbrances; they have issue a son; the wife dies; A. dies intestate; J. S. takes administration durante minoritate of the son, and pays off the mortgage to B. out of the personal estate, and takes an assignment in trust for the issue. Master of the Rolls decreed the debt to C. to be satisfied as far as there were assets of A. and that in taking the account, J. S. the administrator should not be allowed, as against C. the plaintiff, the money by him paid to B. on his assigning the first mortgage. 2 Vern. 304. pl. 295. Mich. 1693. Fox v. Crane and Wight.

(H) Actions. What Actions Tenant in Tail may [171] have, and Pleadings.

1. ENTRY in nature of assise; the demandant counted that one J. N. gave in tail, and it was agreed, that it is not the course to count of a gift; but per Prisot in this case, where it is of a particular estate, he cannot say, that he was seised in his demesne as of fee; for he has only tail; but shall say, that he was seised in his demesne as of frank-tenement. Br. Count. pl. 15. cites 33 H. 6. 14.

2. Tenant in tail shall not have quo jure; for it is a writ of right, so of ne injuste vexes for the same reason. And if tenant in tail brings writ of right, the tenant shall say, that the demandant had nothing the day of the writ purchased, but to himself and his heirs of his body begotten. Br. Tail & Dones, pl. 35. cites 5 E. 4.

3. Tenant in tail shall recover the rent by formedon, without shewing the deed; for the formedon is in the right. But he shall not have avowry nor assise, without shewing the deed, for this is in the possession. Br. Tail & Dones, pl. 26. cites 4 H. 7. 10. Per Keble & Fairfax,

(I) *Tenant in Tail after Possibility. Who is.*

He is called tenant in tail after possibility of issue extinct, because by no possibility he can have any issue inheritable to the same estate tail. But if a man

1. **T**ENANT in fee tail after possibility of issue extinct is, where tenements are given to a man and to his wife in special tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct; and if they have issue, and the one die, albeit that during the life of the issue the survivor shall not be said tenant in tail after possibility of issue extinct, yet if the issue dies without issue, so as there be not any issue alive which may inherit by force of the tail, then the surviving party of the donees is tenant in tail after possibility of issue extinct. Litt. f. 32.

gives land to a man and his wife, and to the heirs of their 2 bodies, and they live till each of them be an hundred years old, and have no issue, yet do they continue tenant in tail; for that the law sees no impossibility of having children. But when a man and his wife be tenant in special tail, and the wife dies without issue, there the law sees an apparent impossibility that any issue that the husband can have by any other wife, should inherit this estate. Co. Litt. 28. x.

2. Also if tenements be given to a man, and to his heirs, which he shall beget on the body of his wife; in this case the wife has nothing in the tenements, and the husband is seised as donee in special tail. And in this case, if the wife dies without issue of her body begotten by her husband, then the husband is tenant in tail after possibility of the issue extinct. Litt. f. 33.

3. None can be tenant in tail after possibility of issue extinct, but one of the donees, or donee in special tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct; because, always during his life, he may by possibility have issue, which may inherit by force of the same entail. And so in the same manner the issue, which is heir to the donees in special tail, cannot be tenant in tail after possibility of issue extinct, for the reason abovesaid. Litt. f. 34.

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2 Inst. 581, 682. cites S. C. but says it was resolved 4thly, that the estate of the feme was changed to an estate for life, punishable of waste; for that the issue in tail, by the fine, was disabled to

4. W. R. seised in fee, gave land to B. and M. his feme, and to the heirs of their 2 bodies begotten, remainder to the heirs of the said B. — B. levied a fine with proclamations, and dies, leaving issue C. a son by the said M. Within 5 years after M. entered claiming her estate. It was insisted, that M. had only an estate for life, punishable of waste, as tenant in tail after possibility. But resolved, that after B.'s death, M. had an estate in tail; and though the issue is barred by the fine, yet the estate of the feme is not touched by it, she being a stranger to the fine, and therefore her estate not changed into an estate for life. 9 Rep. 138. b. Pasch. 10 Jac. in the court of wards. Beaumont's case.

inherit. — This very same case came in question again, in an ejectment by BAKER v. WILLIS, Cro. C. 476. pl. 5. Trin. 13 Car. B. R. and was argued by Crooke and Barkley J. but not by the other justices, because they heard that the parties were about to agree, which, by means of the judges, they afterwards did. But Crooke and Barkley held, that M. by her entry, was tenant in tail, and not tenant after possibility, nor in nature of such a tenancy in tail, but an absolute tenant in tail to all purposes. And Crooke said, that if she be to sue a real action, she must name herself tenant in tail; and cited D. 331. and 351. — Jo. 393. pl. 3. S. C. by name of DIXIE v. BEAUMONT. But nothing said there as to this point; but says the case was argued by Crooke and Barkley, and afterwards the

The matter was compromised. — S. C. cited accordingly, Hob. 257. 259. by Hobart Ch. J. in case of Duncombe v. Wingfield.

So where baron and feme were tenants in tail, remainder to the heirs of the baron by a conveyance made by the baron during coverture; and the baron died, and the feme entered, and was seised; and the issue, in life of the mother, levied a fine to the use of himself and his heirs; it was held, that the mother remained tenant in tail, and so a lease made by her was held good. Cro. J. 688. pl. 5. Trin. 21 Jac. CROCKER v. KELSEY. But in a note there says, this was on a writ of error, brought 3 Car. in the Exchequer-chamber, on a judgment given 2 Car.

5. A. in consideration of marriage, covenanted to stand seised to the use of himself and M. his intended wife, for their lives, without impeachment of waste; and after of their first issue male; and the heirs male of such issue male issuing, &c. And for default of such, then to the use of the heirs of the body of A. and M. And for default, &c. then to the use of B. son and heir apparent of A. (by a former wife) and the heirs male of his body. And for default, &c. A. and M. marry, and have issue C. Afterwards A. dies, not having other issue of the body of M. Then M. enters. C. dies. Resolved, that because M. had estate for life by limitation of the party, and the estate which she had in the remainder, viz. of tenancy in tail after possibility, was not larger in quantity than the estate for life, and consequently cannot drown it, M. was not tenant in tail after possibility; for such estate must be a residue of an estate tail, and must happen by the act of God, and not by limitation. 11 Rep. 79. b. and the 3d resolution, Pasch. 13 Jac. B. R. Lewis Bowles's case.

6. The estate of this tenancy must be altered by the act of God, and that by dying without issue; for if a feoffment in fee be made to the use of a man and his wife for their lives, and after to their next issue male to be begotten in tail; and after to the use of the husband and wife, and of the heirs of their 2 bodies begotten, they having no issue male at that time; in this case the husband and wife are tenants in special tail executed; and after they have issue a son, they are become tenants for life, the remainder to the son in tail, the remainder to them in special tail; for, albeit their estate tail is turned to an estate for life, yet they have a bare estate for life: but if the husband die, having no other issue, and then the son dies without issue, the wife shall have the privileges belonging to a tenant in tail; after possibility of issue extinct, as it appears in LEWIS BOWLES's case. Co. Litt. 28. a.

Such tenancy ought be the residue of an estate in special tail; per Coke Ch. J. Roll. Rep. 180. in case of Bowles v. Berry, and cited 50 E. 3. that feoffment on condition to have for life only is good; but when it is decreased to

an estate for life, he shall not be tenant after possibility, because this must be ex dispositione legis, and not ex provisione hominis. — 11 Rep. 80. b. the 3d resolution in Lewis Bowles's case.

7. If land be given to a man and his wife, and the heirs of their 2 bodies, and after they are divorced, causa præcontractus, or consanguinitatis; or affinitatis, their estate of inheritance is turned to a joint estate for life; and albeit they had once an inheritance in them, yet for that the estate is altered by their own act, and not by the act of God, viz. by the death of either party without issue, they are not tenants in tail after possibility. Co. Litt. 28. a. b.

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Br. Deraignment and Divorce, pl. 13, cites 7 H. 4. 16. — Br. Taille & Dones, &c. pl. 9. cites S. C. — Br. Estates,

pl. 11. cites S. C. — 2 Inst. 682. in Beaumont's case. — 9 Rep. 147. a. in S. C. cites 7 H. 4. 16. and says, that in such case the estate tail is dissolved ab initio, and so the issue is made baron &c.

8. Lands are given *to the husband and wife, and to the heirs of the body of the husband, the remainder to the husband and wife, and to the heirs of their 2 bodies begotten; the husband dies without issue; the wife shall not be tenant in tail after possibility; for the remainder in special tail was utterly void, because it could never take effect; for so long as the husband should have issue, it should inherit by force of the general tail; and if the husband die without issue; then the special estate tail cannot take effect, inasmuch as the issue which should inherit the special tail must be begotten by the husband, and so the general, which is larger and greater, has frustrated the special, which is lesser.* Co. Litt. 28. b.

But if the king give land to a man with a woman of his kindred in frank-marriage,

and the woman dies without issue, the man in the king's case, shall not hold it for his life; because the woman was the cause of the gift. But otherwise it is in the case of a common person. Co. Litt. 21. b. 22. a.

9. If lands be given to a man with a woman in *frank-marriage*, albeit the woman (which was the cause of the gift) dies without issue, yet the husband shall be tenant in tail after possibility, &c. for that he and his wife were donees in special tail; and so within the words of Littleton. Co. Litt. 28. b.

10. If the king gives land to a man and a woman, and the heirs of their 2 bodies, and the woman dies without issue; yet shall the man be tenant in tail after possibility. Co. Litt. 22. b.

(K) Of what Thing Tenant in Tail after Possibility may be.

S. P. per Coke Ch. J. Roll. Rep. 180. in case of Bowles v. Berrie, S. C.

1. THERE is no question but tenant in tail after possibility may be of a remainder, as well as of a possession.

11 Rep. 81. a. Pasch. 13 Jac. B. R. in the 4th resolution in Lewis Bowles's case.

2. And therefore, if lease for life be made to A. the remainder to baron and feme in special tail, and the baron dies without issue, now the feme is tenant in tail after possibility of this remainder; and if A. surrenders to her, as he may, now she is tenant in tail after possibility in possession. 11 Rep. 81. a. per Cur. in the 4th resolution in Lewis Bowles's case.

[174] (L) Privilege of Tenant in Tail after Possibility, or of his Grantee.

1. TENANT in tail, after possibility of issue extinct, has eight qualities and privileges, which tenant in tail himself has, and which lessee for life has not. Co. Litt. 27. b.

2. As, 1st, He is punishable for waste. Co. Litt. 27. b.

S. P. Br. Tail &

Dones, pl. 17. cites 30 Ed. 3. 16. ——— Dr. & Stud. lib. 2. cap. 11 says, the law is clear, that tenant in tail after possibility, &c. is not punishable for waste. ——— 4 Rep. 63. S. P. in H 220 LAKENDEY'S case, because his original estate is not within the statute of Gloucester, cap. 5. ———

2. 122.

Inf. 302. S. P. And though he is within the letter of that statute, yet he is out of the meaning of it, because the inheritance was once in him.

Roll. Rep. 179. S. P. by Doderidge J. cites time of E. 1. Fitzh. Waste, 26. 45 E. 3. 39 E. 3. 16. 12 H. 4. 1. 11 H. 4. 5. 16 H. 6. 16. 7 H. 4. 26 H. 6. Aide, 77. — And per Doderidge J. he shall not be punished for waste, because he continues in by virtue of the livery upon the estate tail; and it seems because by the livery he had power to do waste, though the estate be changed, yet the same liberty continues so long as the gift and livery continues. And per Coke Ch. J. at common law this tenant had a fee, and consequently full power to sell and dispose of the trees; and notwithstanding the statute has made the estate to be only for life, yet the privilege and liberty is not taken away. Roll. Rep. 184. Pasch. 13 Jac. B. R. Bowles v. Berry. — 11 Rep. 80. a. Lewis Bowles's case.

The learned author of An Institute, but now called The New Abridgment, 2d vol. 269. tells us, that to punish the tenant for waste, seems to be against the design and intention of the first donation; for by that the donor gave the inheritance, and an absolute power over the lasting improvements, which are looked upon as part of the inheritance for their duration; and consequently it can be no injury to him in reversion, nor besides his intention in the donation, if the donee exercises the power he was intrusted with by the donor; nor can the donor revoke it, because the authority given by the gift must continue as long as the gift, to which it was annexed, continues. — But see tit. Waste (Q) pl. 1. and (S) pl. 12.

3. 2dly, He shall not be compelled to attorn. Co. Litt. 27. b. S. P. Br. Attorn-

ment, pl. 10. cites 43 E. 3. 1. — Ibid. pl. 11. cites 46 E. 3. 13. — Ibid. pl. 12. cites 46 E. 3. 27. — Ibid. pl. 26. cites 39 E. 3. 20. — Br. Tail & Dones, pl. 17. cites 39 E. 3. 16. — Quid juris clamat lies not against such tenant. Br. Quid Juris clamat, pl. 1. cites 43 E. 3. 1. — Ibid. pl. 6. cites 46 E. 3. 13. — 11 Rep. 80. Pasch. 13 Jac. B. R. in Lewis Bowles's case. — Roll. Rep. 179. S. P. per Curiam, in case of Bowles v. Berry. — Co. Litt. 316. a. S. P. But his assignee shall attorn, because he never had but an estate for life. — 3 Le. 241. pl. 336. Trin. 32 Eliz. in the Exchequer, in GEORGE AR-RICE's case, it was said to have been adjudged in a court of Wales, that the assignee of tenant in tail after possibility of issue should attorn; upon which judgment a writ of error was brought in B. R. and there, upon good advice, the said judgment was affirmed; for although it be true, that tenant in tail after possibility shall not be compelled to attorn, yet that is a privilege which is annexed to his person, and not to the estate; and by the assignment of the estate the privilege is destroyed. — 2 Le. 40. pl. 54. Mich. 30 Eliz. B. R. S. C. accordingly. — S. C. cited per Coke Ch. J. Roll. Rep. 179. in case of Bowles v. Berry. — Co. Litt. 316. a.

In error brought of a judgment in quid juris clamat, Clerk J. conceived that grantee of tenant in tail after possibility, should not be driven to attorn. Sed adjournatur. 3 Le. 121. pl. 173. Trin. 27 Eliz. B. R. Anon. — Le. 291. pl. 397. S. P. — But Co. Litt. 28. a. says, that where tenant in tail after possibility of issue extinct, granted over his estate to another, his grantee was compelled to attorn in a quid juris clamat, as a bare tenant for life, and so be named in the writ; for by the assignment, the privity of the estate being altered, the privilege was gone; cites it as adjudged Mich. 28 & 29 Eliz. in EWENS's case, and judgment affirmed in a writ of error, and says herewith agreeeth 27 H. 6. tit. Aid, Statham, 29 E. 3. 1. b. — S. C. cited 11 Rep. 83. b. in Lewis Bowles's case. — Roll. Rep. 179. S. C. cited by Coke as Owen's case.

4. 3dly, He shall not have aid of him in the reversion. Co. S. P. Br. Litt. 27. b. Tail and Dones, pl.

17. cites 39 E. 3. 16. — S. P. Fitzh. tit. Ayde, pl. 77. cites Trin. 26 H. 6. because the same tenancy, which he had at the first, continues.

Tenant in tail after possibility, &c. shall not have aid, but his grantee shall. Arg. 3 Le. 121. pl. 173. Anon. cites Statham, tit. Aid, 27 H. 6. — Br. Aid, pl. 37. S. P. cites 2 H. 4. 17. Brooke says, it seems the reason is, because he had once an estate of inheritance. — Roll. Rep. 184. S. P. Per Doderidge J. in case of Bowles v. Berry, cites 10 H. 6. 1. — 11 Rep. 80. a. b. Lewis Bowles's case.

S. P. Because he having originally the inheritance by the first gift, has likewise the custody of the writings which are necessary to defend it. 2 New Abr. 269.

5. 4thly, Upon his alienation, no writ of entry in consimili casu lies. Co. Litt. 27. b. S. P. But he in reversion may

enter. Fitzh. tit. Entre Congeable, pl. 56. cites 13 E. 2.

S. P. Because this case is not consimilis to that of tenant for dower, because this tenant had originally the inheritance in him, which the tenant in dower never had. 2 New Abr. 269.

So upon his death the donor shall not have writ of entry in consimili casu, as upon the death of tenant for life; per Doderidge and Coke, quod fuit concessum per Haughton, Roll. Rep. 179. and cited 13 E. 2. Entre Congeable, 56. — 11 Rep. 80. b. Lewis Bowles's case. — Fitzh. tit. Ayde, pl. 77. cites Trin. 26 H. 6. that he shall have formedon in reverter, and not writ of entry. — S. P. As to the formedon; per Doderidge J. quod fuit concessum per Coke. Roll. Rep. 179.

Roll. Rep. 179. in case of Bowles v. Berry. 6. 5thly, After his death no writ of *intrusion* does lie. Co. Litt. 27. b.

S. P. by Coke Ch. J. — 11 Rep. 80. b. Lewis Bowles's case. — S. P. Because this writ is given only upon an entry and intrusion after the death of a bare tenant for life, which this tenant is not. 2 New Abr. 269.

But he shall have formedon, see the notes on the plea next above.

In writ of intrusion, it is a good plea to say that he was seised, and gave to him whom he supposes tenant for life, and to the heirs of his body; and for that he died without heir, he entered, *absque hoc*, that he held for life of the lease of the demandant at the time of his death. F. N. B. 203. (E) in the new notes there (a) cites 24 E. 3. 74.

S. P. Because the deeds belonging to the inheritance lying in his hands, he may make out his title without calling in the reversioner. 2 New Abr. 269. 7. 6thly, He may join the *mise in a writ of right* in a special manner. Co. Litt. 27. b.

longing to the inheritance lying in his hands, he may make out his title without calling in the reversioner. 2 New Abr. 269.

S. P. by Doderidge. Roll. Rep. 179. cites 19 E. 3. 16. But by Coke, he cannot join the *mise* upon the mere right. Ibid. cites 27 H. 6. — 11 Rep. 80. b. Lewis Bowles's case, cites abundance of cases out of the old books.

S. P. For if he does, and it appears to the Court that he is tenant in tail after possibility, the writ shall abate; per Coke and Doderidge. Roll. Rep. 179. cites 18 E. 3. 27. — 11 Rep. 80. b. cites S. C. of 18 E. 3. 27. a. that *feme* brought *cui in vita, quod clamat tenere ad vitam*, and maintained it in her count by gift in special tail to her and her baron, and that her baron is dead without issue, and the writ abated, because of the contrariety of the title.

8. 7thly, In a *præcipe* brought by him, he shall *not name himself tenant for life*. Co. Litt. 27. b.

S. P. Because his original infeudation, by which he claims, was of an estate of inheritance, and not of an estate for life. 2 New Abr. 269. 9. 8thly, In a *præcipe* brought against him, he shall *not be named barely tenant for life*. Co. Litt. 27. b.

In *quid juris clamat*, the defendant pleaded, that he, *tempore levationis notæ prædictæ, was seised in fee of the gift of R. R. absque hoc, quod ipse tempore levationis notæ prædictæ held tenementa prædicta, pro termino vite sua tantum, &c.* And thereupon they were at issue; and it was found that he held them as lands entailed, after possibility of issue, &c. The Court resolved for the defendant; because it appears to the Court, that the defendant has an estate privileged from attornment, to be made by him; and the inducement of the traverse is not any cause of forfeiture. Wherefore it was adjudged for the defendant. Cro. Eliz. 671. pl. 29. Pasch. 41 Eliz. C. B. Veal v. Road. — Noy, 74. Veale v. Reede, S. C. but says nothing of any judgment, but only that upon the question for whom judgment should be given upon this issue; Williams said for the plaintiff, because it is an estate privileged, and ought to have been pleaded in bar. — 11 Rep. 80. b. in Lewis Bowles's case, cites S. C. as adjudged for the defendant, because such tenant shall not in judgment of law be included in writ or fine, &c. within the general allegation of a tenant for life. — S. C. cited Roll. Rep. 179. in case of Bowles v. Berrie, says that in the *quid juris clamat* it was alleged that the defendant was lessee for life at the time of the fine levied, and adjudged for the defendant; for he was not any such tenant as was compellable to attorn in such writ; but says, he that took the traverse was not commended for taking such a desperate traverse, notwithstanding it was helped in this manner; for he was a tenant for life. But the book cites 29 E. 3. 1. b. that if it be alleged that one holds for life, it shall not be taken that he is tenant after possibility.

10. And yet he has 4 other *qualities*, which are *not agreeable to an estate in tail*, but to a bare lessee for life. Co. Litt. 27. b. 28. a.

S. P. Because having no longer a descendible estate in him, he cannot transfer it to another, without the prejudice and disinheritance of him in remainder. 2 New Abr. 269. 11. As, 1st, If he makes a *feoffment in fee*, this is a *forfeiture* of his estate. Co. Litt. 28. a.

descendible estate in him, he cannot transfer it to another, without the prejudice and disinheritance of him in remainder. 2 New Abr. 269.

* He in remainder may enter for alienation. Br. Aids, pl. 37. cites 7 H. 4. 10. and 39 E. 3. — Br. Forfeitures, pl. 88. cites 45 E. 3. 25. — Br. Entre Congeable, pl. 12. cites S. C. — Br. Tail & Dones, pl. 17. cites 39 E. 3. 16. — Roll. Rep. 179. Pasch. 13 Jac. B. R. in case of Bowles v. Berry, per Doderidge J. cites 13 E. 2. Fitzh. Entre Congeable, 56. 13 H. 4. 30 E. 3. 16. accordingly.

* [176]

Accordingly, quod fuit concessum per Curiam. — 11 Rep. 80. b. in Lewis Bowles's case, cites 45 E. 3. 22. 28 E. 3. 96. b. 27 Aff. 60.

12. 2dly, If an estate in fee, or in fee tail in reversion or remainder descend, or come to this tenant, his *estate is drowned*, and the fee or fee tail executed. Co. Litt. 28. a. Br. Estates, pl. 25. cites 9 E. 4. 17, 18.—Roll. Rep. 179.

S. P. per Doderidge, and cited 9 E. 4. 50 E. 3. 35. 7 H. 4. 23. Quod fuit concessum per Coke, and he cited the same books also. — 11 Rep. 80. b. in Lewis Bowles's case, cites 32 E. 3. tit. Age, 55. 50 E. 3. 4. 9 E. 4. 17. b.

13. 3dly, He in *reversion* or remainder shall be *received upon his default*, as well as upon that of bare tenant for life. Co. Litt. 28. a. S. P. Br. Aide, pl. 37. cites 7 H. 4. 10. and 39 E. 3.—

S. P. Br. Taile & Dones, pl. 17.—S. P. 11 Rep. 80. b. Lewis Bowles's case, cites 2 E. 2. Resceit, 147. 41 E. 3. 12. 20 E. 3. Tit. Resceit. 38 E. 3. 33.—S. P. Roll. Rep. 179. per Doderidge J. cites 11 H. 6. 15. 10 H. 6. 1. Quod fuit concessum per Crooke and Haughton; but Haughton said, that this is by the express words of the statute of rescuits, which says (per donum) but said, that if it had not been for the express words, he doubted whether he should be received.

14. 4thly, An *exchange* between a bare tenant for life, and him, is good; for their estates in respect of their quantity are equal, so as the difference stands in the quality, and not in the quantity of the estate. And as an estate tail was originally carved out of a fee-simple, so is the estate of this tenant out of an estate in special tail. Co. Litt. 28. a. S. P. Per Coke Ch. J. Roll. Rep. 179. — 11 Rep. 80. b. S. P. Lewis Bowles's case.

15. Tenant in tail *recovers in assise*, and after becomes tenant in tail after possibility, &c. he shall have *redisseisin*. Per Doderidge J. Roll. Rep. 179. in case of Bowles v. Berry. Fitzh. tit. Aid, pl. 77. cites Trin. 26 H. 6.— 11 Rep. 81.

a. in the 3d resolution in Lewis Bowles's case; for it is the same franktenement as he had before, this being parcel of the estate-tail. — Co. Litt. 154. b.

16. In some case a person who is *not really* and strictly tenant in tail after possibility, shall have the privilege of such tenant. As in the case of the wife in LEWIS BOWLES's case, 11 Rep. 81. a. where an estate for life fell to her on her baron's death by reason of a prior limitation in their marriage settlement, and afterwards, by the death of the issue in special tail without issue, an estate of tenancy in tail after possibility would have fallen to her by means of a subsequent limitation in the same settlement (viz. in default of issue male of their 2 bodies, then to the heirs of the bodies of the baron and feme); but she being in of the estate for life, and that estate being equal in quantity with the tenancy in tail after possibility, and consequently could not merge in it, and so could not be tenant in tail after possibility, besides, that such estate is always a residue of an estate tail, and must happen by the act of God, as by death, and not by limitation of the party, yet it was resolved that now after such issue's death she shall have the privilege of such tenant, by reason of the inheritance which was once in her. See the case at (I) pl 5

For

For more of Tayle in general, see *Deville, Estates, Fines, Forfeiture, Forfeiture, Mortd'ancestor, Recovery, Common, Remainder*, and other proper titles.

(A) *Necessary* in what Cases.

1. IF a man be *bound to pay rent-service, or rent-charge*, there he need not to tender it; but it suffices to be ready upon the land; *quod non negatur*. Br. Tender, pl. 22. cites 14 E. 4.4.

2. *But annuity* ought to be tendered, to save the obligation.
Br. Tender, pl. 22. cites 14 E. 4. 4.

3. Per Anderson, Ch. J. there is a difference where the *obligation precedes the duty*, which accrues by a matter subsequent, and where the *duty precedes the obligation*, which was made for the further assurance of the duty. In the first case a tender must be pleaded, and cites 14 E. 4. 4. where A. was bound to B. that whereas he had granted a rent-charge; now if B. should enjoy the said rent, according to the said grant, that then, &c. he needs not plead any tender, because the rent is *not payable in other manner than it was before*. Contrary if the condition had been for *payment of the money*, or annuity; and of that opinion was the whole Court. Le. 71. pl. 95. Mich. 29 & 30 Eliz. C. B. in case of Bret v. Audar, alias Andrews.

4. A tender is not necessary in any cases, but *where there is a penalty*. Per Holt Ch. J. Comb. 334. Trin. 7 W. 3. B. R. in case of Broome v. Pine.

(B) *Good. In respect of the Thing tendered.*

**This case is
D. 81, b. pl.
67. Barring-
ton v. Potter.**

1. **A**FTER the fall and embasement of money in 5 E. 6. debt was brought against executor of lessee for years, for rent-arrear for 2 years at Mich. 2 E. 6. at which time the *shillings*, which at the time of the action brought were decreed to 6d., were current at 12d. The defendant pleaded tender of the rent at the days when it was due, in peciis monetæ Angliæ vocat shillings; and said, that every shilling at the time of the tender was payable for 12d. but that the plaintiff nor any for him was ready to receive

ceive it. And concludes, that he is uncore prist to pay the arrears in dictis peciis vocat shillings, secundum ratam, &c. The plaintiff demurred; but afterwards accepted the money secundum ratam prædictam, without costs or damages. Dav. Rep. 27. in the case of mixed moneys, cites D. 81. 6 & 7 E. 6.

2. In debt upon bond for payment of 24 l. at 2 several days, the defendant pleaded, that at the day and place limited for payment, *there was current certain money called pollards, in lieu of sterling, &c.* and that defendant, at the first day of payment, tendered the moiety of the debt in the money called pollards, which the plaintiff refused; and that he is uncore prist, &c. and offers it in court. And because the plaintiff did not deny it, it was awarded, that he recover one moiety in * pollards, and the other in pure sterling money. Dav. Rep. in the case of mixed moneys, cites it adjudged 29 E. 1. and reported by Dyer, 7 E. 6. 82. b.

This is at D. 82. a. b. pl. 69. Hill. 6 & 7 E. 6. cites a book in the custody of Lord Mountague; but says it is not in his own book of pleas of the same year. Pong v. Lindsey & al.

3. The mortgagor was bound to pay 250 l. of lawful money of *England*, on a certain day and place, and he tendered money accordingly; but because *there was 5 s. in Spanish money*, and two foreign pieces of gold called double pistolets, the mortgagee refused to take it. Adjudged, that Spanish silver was lawful money of England, being made so by proclamation; and that the king, by his absolute prerogative, may make foreign coin lawful money of England. 5 Rep. 114. Trin. 43 Eliz. C. B. Wade's case.

* [178]

4. Queen Elizabeth made a large quantity of mixed money in the Tower of London, and sent it into Ireland to pay the army there; with a proclamation, dated 24 May, 43d of her reign, that the said money should be lawful and current in that kingdom, and accepted and received as such; and that they who refused it should be punished for a contempt. And by the same proclamation she put down, from the 10th of June next, all other coins current there. A merchant in Ireland had bought goods of G. in London, and was bound to G. in a bond of 200 l. conditioned to pay to the said G. 100 l. sterling in Ireland on a certain day, which happened after the proclamation; at which day the obligor tendered the 100 l. in mixed money. Resolved, that the tender was good. Dav. Rep. 18. Trin. 2 Jac. the case of mixed money.

5. If a man be obliged to pay 100 l. French crowns, yet he may tender all in English money. Per Jones J. Lat. 84. in case of Ward v. Ridgwin.

Palm. 407. S. C. & per Jones; so he may e converso.

6. Our law takes notice of guineas, and they are current here for 20 s. for before guineas were coined there was a 20 s. piece of gold, which by proclamation was raised to 21 s. 4 d. whereupon guineas were coined at 1 s. 4 d. less. And provided any piece has the king's stamp, and be coined at the mint, it shall be current without proclamation, in proportion to its value. And in indebitatus assumpsit the plaintiff need not set forth they were guineas

2 Salk. 446. S. C.

guineas which defendant received, but so much money received to his use. Per Holt Ch. J. Comb. 387. Mich. 8 W. 3. B. R. Dickson v. Willowes.

7. Tender of a *bank note* is not strictly a legal tender; but it being proved, that the plaintiff offered to turn it into money, it then became a good tender. Abr. Equ. Cases, 319. Hill. 1729. Austen v. Executors of Sir William Dodwell.

See (D).

(C) Good. By whom.

1. **TENDER** [of rent-service] to the lord, by one who has only a lease for term of years, is not good. Br. Tender, pl. 2. cites 2 H. 6. 1. — Brooke says, it seems it is not good at this day, after the statute * of 21 H. 8, any more than before.

* See Avowry.

2. In replevin, payment by one jointenant is good for all, and against all, as seisin of rent obtained. Contra of attornment by the one. Br. Tender, pl. 16. cites 39 H. 6. 2, 3.

3. If a man grants an annuity till the defendant be promoted to a benefice by R. the grantor, the tender of the benefice shall be by R. and not by his successor; for the case was by prior and covent, &c. Br. Tender, pl. 15. cites 14 H. 7. 31. & 15 H. 7. 1.

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4. Where a lord of parliament is impleaded by cessavit, if he will tender the arrears, he shall tender them in proper person; so of all other tenants in cessavit. Br. Tender, pl. 29. cites 15 H. 7. 9.

S. C. cited Mo. 336. pl. 455. in Englefield's case — And 4 Le. 176. pl. 276. in S. C. — and pl. C. 291. b. in

5. If a feoffment be on condition that feoffee pay 20l. at Michaelmas to the feoffor, otherwise that feoffor shall re-enter, and feoffee before the day enfeoffs J. S. in this case a tender by the feoffee or J. S. at Michaelmas is good, and upon refusal the condition is gone. For the first feoffee was privy to the condition, and the 2d in estate, and in judgment of law has an estate and interest in the condition for the salvation of his tenancy. Litt. f. 336.

case of Chapman v. Dalton. — And 5 Rep. 96. b. in Goodale's case. — S. C. cited per Sir Joseph Jekyl. 10 Mod. 420. in case of Marks v. Marks.

6. If a feoffment be made upon condition, that if the feoffor pay such a sum to the feoffee, then the feoffor and his heirs may enter; if the feoffee dies before the payment, and the heir will tender to the feoffee the money, such tender is void, because the time, within which this ought to be done, is past; for when the condition is, that if the feoffor pay the money to the feoffee, &c. this is as much as to say, as if the feoffor during his life pay the money to the feoffee, &c. and when the feoffor dies, then the time of the tender is past. But otherwise, where a day of payment is limited, and the feoffor dies before the day, then may the heir tender the money, as is aforesaid; for that the + time of the tender was not past by the death of the feoffor. Also it seems, that in such case where the feoffor dies before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it,

+ See pl. 9. Marks v. Marks.

it, the heirs of the feoffor may enter, &c. because the executors represent the person of their testator, &c. Litt. f. 337.

7. If a man bring an action of *trespass* for taking away his *beasts* or other goods, there *tender* of sufficient amends before the action brought is *no bar*, because he that tendered the amends is *not the owner* of the goods, but a trespasser, whom the law favours not. 2 Inst. 107.

8. A lease for years was made upon condition to be void by the tender of 6d. to the lessee by him in reversion; the lessee entered and was disseised by another; the question was, whether the tender of the 6d. to avoid the lease might now be made by the reversioner after the disseisin. The whole Court was of opinion that it might; for this payment is a collateral thing. And judgment accordingly. Bull. 118. Pasch. 9 Jac. Plaut. v. Sleep.

9. A. had issue 3 sons; B. his eldest, who died in his life-time leaving a daughter, and C. and D. — A. devises lands to his wife for life, and after her death to D. and his heirs, provided, that if C. do, within 3 months after the death of the wife, pay to D. the sum of 500 l. then the lands to remain to C. and his heirs. C. died in the life-time of the wife, leaving N. his heir. D. enters within 3 months after the wife's death. N. brought a bill to have a conveyance on payment of the 500 l. The principal point was, whether this 500 l. being to be paid within a limited time by C. and he dying within that time, the heir at law of C. who was not heir at law of A. could now on payment make a title? The counsel for the plaintiff, among other things, insisted on Co. Litt. f. 134. and Coke's comment thereupon; to which it was answered on the other side, that the case there was but in nature of a mortgage; that it was to relieve against a forfeiture by non-payment of the money at the day, which may be good, even at law, much more in this court; that there was a wide difference between a condition precedent, and a condition subsequent; that that was a condition subsequent, and for the revesting of the estate, and the condition descended * on the heir, and consequently might be performed by him, though not named; that this was a condition precedent, and for the new creation of an estate in a person who had no right or title before, and was not heir at law; that this was personal in C. that he had not *ius in re*, nor *ad rem*, and could neither have devised, released, or extinguished this condition; that it was a bare possibility, and he dying before it was performed, his heir could not make it good. But the Master of the Rolls denied this to be a condition, because such is only to be performed by the party making it or his heirs; whereas this is to be performed by a 3d person. Nor is it in nature of a remainder to C. the devise to D. being not in tail, but in fee, and a remainder can be only after a tail or less estate; so that this is an *executory devise*, or may be called a possibility in the largest extent of the word, but is not strictly such; for nothing was vested in C. which he could either grant or release, nor did any thing descend to his heir: that (heirs) in this case were not named to take by purchase, but by descent; and the naming them was to denote the quantity of the estate, and was

Cro. J. 275.
pl. 4. S. C.
accordingly.

* [180]
10 Mod. 419
to 426.
Mich. 5
Geo. 1.
S. C. de-
creed for
plaintiff by
the Lord
Chancellor,
assisted by
Sir Joseph
Jekyll Mas-
ter of the
Rolls, who
observed,
that this was
upon the
case of a
will, where
the law has
ever allowed
the greatest
latitude of
construc-
tion, in sup-
port of the
intention of
the testator;
that nobody
can doubt
but the tes-
tator's in-
tention was
to give the
land only
in the na-
ture of a
security for
500 l. and
that C. was
to have the
fee-simple.
And Ld. C.
Parker said,
that though
the words
of the will
are only, that
C. shall pay
and not that
was

C. and his heirs shall, yet that is only a plain mistake in the will, which is a conveyance which the law supposes to be made when a man is inops consilii, and therefore allows great favour to be used in its construction; that if A. had made a feoffment to D. upon condition, that

was to take and not to give them any estate originally; and cited 10 Rep. Lampett's case, and Pl. C. Brett v. Rigden. But it was argued, that the possibility of performing this condition was an interest, or right, or scintilla juris, which vested in C. himself, and that he survived A. and so this differed from Brett and Rigden's case; and consequently such right, possibility, or interest, descended to his heir, and might be performed by him, as before the statute de donis the possibility of reverter descended to the heirs of the donor. The Master of the Rolls looking on this as a case of some difficulty, appointed it to be spoke to again when the court is full. Afterwards, in Mich. term, 5 Geo. 1. it was decreed by Ld. Chancellor and Master of the Rolls for the plaintiff upon Litt. f. * 334, 335, 336; and 337. Co. Litt. 205. &c. And they said, that though a condition was not in strictness of law deviseable, yet since the statute of uses, the devisee may take benefit of it by an equitable construction of the statute; and that C. might have released or extinguished his right. Chan. Prec. 486, Pasch. 1718. Marks v. Marks.

if the testator should pay so much money to D. then C. should have fee, this is a condition, the right of performing which descends to the heir of the testator, and the heir would be at liberty to take advantage of it; for the limitation of the fee over to C. would be void, by a particular maxim of the common law, which will not allow a fee to be limited upon a fee, or by that other maxim, which excludes a stranger from taking advantage of a condition; that the testator gives the land to D. redeemable upon the payment of 500l. and he gives the equity of redemption to C.—C. therefore seemed to him to have an equity of redemption, that remains open to him in a court of equity, as well after the time limited, as before. That indeed there might have been a difference between this case and the case of a common mortgage, where, though when the day is past, and so the legal estate is absolutely vested in the mortgagee, yet in equity a right to redeem remains, had C. been to come here for relief against the heir at law: but this is not the case; for he comes for relief against a third person, who had the estate vested in him for no other purpose but to make the estate redeemable; that payment of a small trifling sum may be considered rather as a ceremony than a valuable consideration. And this he took to be the ground upon which the two judges went, who in the case of SPRING AND CÆSAR held the payment of the 10s. to be a personal act; for when the sum comes to be considerable, as here it is 500l. the payment of it is never esteemed a personal act; and this appears throughout ENGLFIELD's case in the 7th report; that the case of the feoffment in the section of Littleton, is parallel in all respects to the present case; parallel as to the condition, as to the performance, as to the effect of the performance, and differs only as to the person who is to take advantage of the performance of it. And this is supplied by the statute of wills, which gives the 3d person as good a title to take advantage of it, as the feoffor had by the common law.

I have likewise a MS. report of this case, agreeable to the books above-mentioned; and there Ld. C. Parker said, that if the heir of C. pays, C. pays to all the purposes of the will, by his representative; that certainly it is not necessary that the estate should vest in C. in order to descend to his heir; that the ground of Wood's case, [which had been cited, and is in SWELLY's case, 1 Rep: 90. a.] was, that a right vested and descended, but here the condition is, subsequent in respect to D. and precedent to the vesting C.'s estate, and not so properly to defeat the estate of D. as to vest it in C. and † as to this the case of Wood is exactly the same; and the only difference between them is, that in Wood's case the condition was for the benefit of the covenantor and his heirs, but here for a 3d person; that there the old estate is taken, but here C. takes a new one; but that this is a difference only in sound, and here it is upon the operation of a will, and each party has the benefit intended him; if the estate had descended to the heir at law, C.'s condition would have been precedent, but here the estate being given to D. the condition is subsequent; be it the one or the other, if it is performed it is all one, and the heir's payment is a good payment. The advantage was vested in C. which he might have released or extinguished, but not having done so, his heir has it.—N. B. It appears by the printed reports of this case, and likewise by the MS. report, that the reason why this, being a point purely at law, was brought into equity, was, that D. had so mortgaged and incumbered the estate by a marriage settlement on his wife, that the plaintiff prayed relief, and the direction of the Court, to whom he should make a tender of the money. And Ld. Chancellor (as my MS. report has it) said, it was proper for the plaintiff to come here for relief, because of the uncertainty to whom the money should be paid; that perhaps, a payment to D. would have been a good payment, according to the will; but it is a question if it had been secure against the mortgages and settlements of D. That the decree must be in nature of a redemption; that the money must be paid to the master, to be laid out in a purchase of land to be settled to the uses of D.'s marriage settlement, and the profits in the mean time, during D.'s life, to be paid to his mortgagee, according to their priority.

* See Mortgage (N) pl. 1.

(D) Good. To whom.

1. IF the *conusee upon a statute merchant makes assignment after that* he has had *execution* of the land by the statute, then the tender of the money shall be made to the assignee, quod nota; and quære, if it be not good to the conusee himself. Br. Tender, pl. 38. cites 15 E. 3. & Fitzh. Responder, 1.

Tender may be to the conusee of a statute, and not to the assignee. P. Hale Ch. J.

Vent. 211, Pasch. 24 Car. 2. B. R. Anon.

2. Tender to the assignee of the feoffee, upon defeasance of a release of right was pleaded; and quære of it. Br. Tender, pl. 17. cites 17 Aff. 2.

Br. Conditions, pl. 103. S. C.

3. Where the defendant in debt will tender the money to the sheriff in pais, or in *præcipe quod reddat* will offer to render the land in pais to the demandant, yet the sheriff shall not cease to make the summons, or serve the process; for if such tender may be good against the will of the parties, then the plaintiff or demandant shall lose his damages, which is not reason. Per Thirning. Br. Tender, pl. 9. cites 11 H. 6. 62.

4. If obligee assigns A. to receive the money at the day and place limited in the bond, a tender to A. is sufficient. Mo. 37. pl. 120. Trin. 4 Eliz. Anon.

5. But where the condition is to pay money to a stranger, the payment be made at the peril of the obligor. Mo. 37. pl. 120. Anon.

6. Rent was reserved payable at Lady-day or a month after; tender at the house of lessor, and payment there to the daughter-in-law of lessor (who had formerly received the rent by order of lessor) between Lady-day and the month after, is no good tender, because before the month end lessor could not distrain or have debt for the rent. But where the reservation is at Lady-day, and the month after is given only for saving a re-entry, there such tender was held good by Wray Ch. J. 2 Le. 130. pl. 173. Hill. 28 Eliz. B. R. Crop v. Hambleton.

Mo. 223. p. 363. S. C. reports the tender to his person. — Godb. 38. pl. 43. Croppes's case S. C. reports it tendered to the daughter-in-law.

and they supposed lessor's refusal to be trickish; and judgment against him.—Cro. E. 48. S. C. reports that the 2 first payments were to the servant, a 3d payment to the lessor, a 4th payment to the same servant, who within the 20 days tendered it to the lessor; per Cur. The tender out of the land at any time within the month, is good; and the tender by the servant was as servant of the lessee for the time, and all one as if lessee had tendered it.

7. A. was obliged to B. to the use of C. to deliver a chest to C. [182] who refused to receive it upon the tender at the day; the obligation was saved, because the obligation was to the use of C. for he shall not take advantage of his own act. Cited by Glanville, Cro. Eliz. 755. pl. 16. Pasch. 42 Eliz. in C. B. in case of Huish v. Philips, as adjudged between Carne and Savery.

8. Audita querela by H. set forth, that he was bound in a statute of 600 l. to P. the defendant, to the use of J. B. with a defeasance, that if he paid such sums at such several days to J. B. it should be void;

Upon error brought of this judgment, it was void;

resolved, that though J. B. was a stranger to the recognizance, yet it being averred to be made to his use, he ought at his peril to be ready at the place every day to receive it; otherwise the recognizance is not forfeited, when

void; and that at every of the said days and places, he was paratus to pay the said sums, and obtulit them; and that J. B. was not there. The defendant pleaded, that *such a day J. B. was at the place, &c. and demanded the sum, and neither the plaintiff, nor any for him, were there to pay it, absque hoc; that the plaintiff obtulit the said sum at the said day. Upon demurrer, it was insisted for defendant, that on this matter an audita querela lies not, because J. B. is a stranger to the statute; and though the plaintiff tendered to a stranger who refused, yet the recognizance is forfeited; for he must, at his peril, procure the stranger to accept it, when the act is to be done by a stranger. But all the Court held, that the tender was a sufficient performance, the defeasance being made to the use of J. B., but had he been a mere stranger, and not to have any benefit thereof, it would be otherwise. Cro. E. 755. pl. 18. Pasch. 42 Eliz. C. B. Huish v. Philips.

the other does not tender it. Judgment was affirmed. Cro. J. 13. pl. 17. Pasch. 1 Jac. B. R. Philips v. Rice Hugre. — It was not any duty in J. B. but it is as a penalty inflicted upon H. that he should pay to J. B. and so being a collateral duty, payable only to J. B. a stranger, J. B. ought to be there in person, or by attorney, to receive it; and H. is not constrained to exceed the words of the defeasance. Per tot. Cur. Yelv. 38. S. C. in B. R.

* It seems, by Yelv. ut supra, that the plea of defendant was, that H. (the plaintiff) non obtulit at every of the said days, &c. pro placito dicit quod J. B. dicit, which the book says is as if P. (the defendant) had told a tale out of J. B.'s mouth.

9. A mortgagee after settling an account with B. the mortgagor, and time agreed upon for discharging the mortgage died, leaving 4 executors in trust for his daughter; B. on the day tendered the money to one of the executors, who refused to accept the tender, neither of them having proved the will; then B. made a like tender to another of the executors, who refused likewise giving the same reason. Decreed, that this was a good tender, and that any or either of the executors might have given a good discharge before probate, especially when, as appeared in the case, they afterwards proved the will, and so were executors ab initio; and the infant heir at law was to convey the inheritance descended to her according to the act 7 Anna, for obliging infant trustees to assign and convey. Hill. 1729, at Ld. Chancellor's. Abr. Equ. Cases, 318. Austin v. Executors of Sir Wm. Dodwell.

(E) Good. How.

1. **CONDITION** was, that the feeffee shall render certain tynn at such a day, and he tendered and the other refused. The question was, whether he shall render the price as it was at the time of the payment, or as it is now? &c. Br. Conditions, pl. 113. cites 30 Aff. 11.

B. P. Br. Tender, pl. 39. cites 1 R. 3.

2. It was agreed in avowry, that where the lord distrains for 2 rent days arrear, and the tenant offers the one, the lord is bound to receive it, and if he distrains he does a tort. Br. Tender, pl. 2. cites 2 H. 5. 1.

3. But if he distrains for the rent of one day, and tenant offers part of it, the lord is not bound to receive it, but he may distrain. Note the diversity. Br. Tender, pl. 2. cites 2 H. 6. 1. S. P. Br. Tender, pl. 39. cites 1 R. 3.— So of the part of the debt. Br. Tender, pl. 39. cites 1 R. 3.— But if he accepts part after judgment, he cannot demand the rest. Br. Tender, pl. 39. cites 1 R. 3.

4. The scoffee may tender the money in purses or * bags, without shewing or telling the same; for he does that which he ought, viz. to bring the money in purses or bags, which is the usual manner to carry money in, and then it is the part of the party, that is to receive it, to put it out and tell it. Co. Litt. 208. 2. * S. P. If in fact there was so much money in them to satisfy the debt; and if there is

any bad money in the bags, and the mortgagee accepts it, the mortgagor is not bound to change it. 5 Rep. 115. WADE's case, and said there to have been so resolved in WINTER's case, and in the case of VANE v. STUDLEY, who put the money into his purse, and after took it out and told it over again, and found counterfeit pieces.

So where he brought in a bag, and cast it on the table before the obligee, it was held good. Noy, 67. Flower's case.

But where mortgagor came at the day and place and said to the mortgagee, Here I am ready to pay you the 200l. and yet held it all the time on his arm in bags, it was adjudged no tender; for it might be counters or base money for any thing appeared; and per Anderson, it is no good tender to say, I am ready, &c. Noy, 74. Suckling v. Coney.

5. Mortgage by A. to B. for 400l. payable at a day and place certain. C. prevailed upon B. at the day to take the money at C.'s house, and the money was told and delivered in bags to B. but differences arising between A. and B. C. said if they would not agree they should not have his money. Per Cur. this was no sufficient tender; whereupon A. requested C. that he might have the money to carry to the said porch of the said parish church, who was contented, and there B. came to receive it, and A. would not pay it. It was moved, that this was a good payment to discharge the mortgage; for the money was told in the house of C. and B. there put it up into bags; and the same is a good payment and receipt. But it was answered, that this is no payment; for it was not the money of A. but of C. as appears by the words of C. (scil.) if they could not agree, they should not have his money; also A. requested C. that he might have the money to carry to the porch of the parish-church aforesaid, by which it appears that it was not A.'s money. And for that cause it was also the opinion of the Court, that the same was not any sufficient tender. 2 Le. 213. pl. 268. Trin. 31 Eliz. B. R. Winter v. Loveday. Ow. 34. S. C. but it is only a very short note of it.

6. If a man tenders more than he ought to pay, it is good enough, and the other ought to accept so much thereof as is due to him. The 3d resolution, 5 Rep. 115. a. Trin. 43 Eliz. 1. C. B. Wade's case.

7. A man cannot make a tender, unless he shews for what purpose he makes such tender; per Underidge J. Lat. 70. in case of Warner v. Harding.

8. If a 3d person puts the ring (or other thing to be tendered) into the hands of the person to whom the tender is to be made, and at the same time declares for what the other tenders the ring, it is good.

good; per Doderidge, to which Crew Ch. J. agreed. Lat 109. in case of Wardner v. Hardwin.

9. The defendant agreed to pay 1500*l.* to the plaintiff, upon his assigning a judgment. *Ld. C. Macclesfield* declared, that where there are no words to determine the priority of the acts, a middle way is to be chosen. The party is *not obliged to make an absolute tender of the money first, but by such words as these, I tender you the money so as you make an assignment.* 2 Barnard. Rep. in B. R. 308. Trin. 6 Geo. 2. in case of Anvert v. Ennover, cites it as Trin. 13 Ann. the case of Turner v. Goodwyn.

[184] 10. An account was settled between B. mortgagor and A. mortgagee of what would be due at such a time, when the money was agreed to be paid and received, and the sum was agreed to be 4479*l.* At the day fixed B. tendered a bank bill of 4500*l.* to C. the executor of the mortgagee, to take thereout what was then due for principal and interest. C. refused to accept the tender, whereupon B. asked C. if he objected to the legality of the tender, being in a bank bill, and not in money, and that if he did he would presently turn it into money. Lord Chancellor held that this tender of a bank note was not strictly legal; but since it was proved that B. offered to turn it into money, it became thereby a good tender. Abr. Equ. Cases, 318. Hill. 1729. Austin v. Executors of Sir Wm. Dodwell.

(F) Place. *At what Place it may, or ought to be.*

1. **TENDER** of homage in a foreign county, in which the land does not lie, is a good tender. Br. Tender, pl. 30. cites 21 Aff. 14.

But in debt for rent upon a lease, ten-

2. Tender of rent is sufficient upon the land, and the other cannot distrain. Br. Tender, pl. 18. cites 30 Aff. 38. *der of the rent upon the land, and refusal by the plaintiff, is no plea.* Br. Tender, pl. 22. cites 14 E. 4. 4. — *Contra in avowry for the same rent.* Ibid.

But the book makes a quare, if the lord had distrained for a fee, or honour, or for suit or castle-guard, or

for homage, what tender shall be made there. See Br. Tender, pl. 31. And 30 Aff. 38.

3. If a man holds lands in the county of D. by 3 d. rent, of which the lord has been seised time out of mind at S. in another county, if the lord distrains upon the land, and the tenant tenders the rent upon the land, this is a good tender, and he shall not be compelled to go to a foreign county where, &c. to tender it there. Br. Tender, pl. 31. cites 30 Aff. 38.

4. Where rent is reserved upon a lease for life, rendering rent at Easter, and for default of payment a penalty of 10*l.* if the tenant tenders the rent to the lessor, or is ready to pay upon the land, this shall excuse the penalty. Br. Tender, pl. 11. cites 22 H. 6. 57. per Newton.

5. If a feoffment in fee be made, reserving a yearly rent, and for default of payment a re-entry, &c. the tenant needeth not to tender the rent, but upon the land, because this is a rent issuing out

of the land, which is a rent seck; for if the feoffor be seised once of this rent, and after cometh upon the land, &c. and the rent is denied him, he may have an *assise of novel disseisin*; for though he may enter for the condition broken, yet he may either relinquish his entry, or have an assise. Litt. f. 341.

6. If the feoffee comes to the feoffor *at any place, upon any part of the ground at the day of payment*, and offers his rent, though not at the most notorious place, nor at the last instant, the feoffor is bound to receive it, or else he shall not take any advantage of any demand of rent for that day. Co. Litt. 202. a.

7. Tender being *to be made at a certain place*, cannot properly be made any where else; per Cur. Freem. Rep. 149. pl. 169. Pasch. 1674. in case of Marshall v. Wisdale.

(G) *No Place being limited.* In what Cases it must [185] be to the Person.

1. **WHERE** a *place certain is limited*, and he tenders there, it is sufficient, though none be there to receive it, by some, and so is Littleton. But *where no place is limited*, he shall tender to the person, or upon the tenements. Contrary upon the tenements by Littleton, upon mortgage; and payment elsewhere, where the party receives it, is good. Br. Conditions, pl. 103. cites 17 Aff. 2.

Br. Tender, pl. 17. cites S. C.

2. In debt of 20l. the plaintiff declared upon indenture made of a *lease for term of years to the defendant, rendering 10l. rent at Easter, and other covenants*, and shewed what, &c. *ex utraque parte, and ad omnes conventiones predict. perimplendas, each of them for his part bound themselves to the other in 20l.* and that the defendant did not pay the 10l. at Easter last, and therefore he demanded the 20l. The defendant pleaded, *that at Easter, &c. he was all the day upon the land, ready to pay the 10l. and none came of the part of the plaintiff to receive, &c.* And per Newton, Ashton, and Port. in debt upon a lease for term of years, tender upon the land is a good plea in excuse of damages: but *where a collateral surety is found by another deed, or the party binds himself by obligation to pay it at the day in the indenture*, this does not depend upon the lease, therefore there he ought to inquire him out where he is, and to tender payment to him. But in this case where it is in the indenture of lease, this refers to the payment in the indenture of lease, which is to be made upon the land, and therefore a good plea, quod nota, *diversity where it is by the indenture of lease, and where it is by another indenture or obligation.* Br. Tender, pl. 11. cites 22 H. 6. 57.

Br. Dette, pl. 102. cites 22 H. 6. 5. — If a man leases for years, rendering rent at Michaelmas, and other covenants, if he be bound in an obligation to pay the rent precisely, there he shall seek the lessor. Br. Tender, pl. 20. cites 6 E. 6. — Br. Tender, pl. 11. cites S. C. — But if he be bound to perform the covenants,

Sec. there tender upon the land suffices, because there the payment is of the nature of the rent reserved. Contra in the first case. Br. Tender, pl. 20. cites 6 E. 6. — Br. Tender, pl. 11. cites S. C.

3. Some say, if the *feoffor upon condition be upon the land ready to pay*, at the day set, and the *feoffee is not then there*, the feoffor

It has been often times resolved,

that seeing the money is a sum in gross, and collateral to the title of the land, that the feoffor must tender the

feoffor is quit, and excused of the payment, for that no default is in him. But some think that the law is contrary, and that he is *bound to seek the feoffee*, if he be in *England*. As if a man be *bound in 20 l. upon condition to pay to the obligee, at such a day, 10 l.* the obligor must seek the obligee, if he be in *England*, and at the day tender unto him the said 10 l. Litt. f. 340.

money to the person of the feoffee, according to the latter opinion; and it is not sufficient for him to tender it upon the land; otherwise it is of a rent that issues out of the land. But if the *condition* of a bond or feoffment be *to deliver 20 quarters of wheat, or 20 load of timber, or such like*, the obligor or feoffor is not bound to carry the same about, and seek the feoffee; but the obligor or feoffor, before the day, must go to the feoffee, and know where he will appoint to receive it; and there it must be delivered. And so note a diversity between money and *things pondrous*, or of great weight. If the condition of a bond or feoffment be *to make a feoffment*, there it is sufficient for him to tender it upon the land, because the state must pass by livery. Co. Litt. 210. b.

4. If the *obligee, &c.* be *out of the realm* of *England*, the obligor, &c. is not bound to seek him, or to go out of the realm unto him; and because the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land, as if he had duly tendered it according to the condition. Co. Litt. f. 210. b.

[186] (H) Time. *At what Time* it may or ought to be made.

Br. Tender, pl. 21. cites S. C.—

Where a man leases land for years, rendering rent, and for default of payment to re-enter, it suffices for the lessee to tender the rent upon the land the last

1. **WHERE** a man leases rendering rent, and for non-payment by one month to re-enter, and the *tenant tenders upon the land all the day*, and the *lessor does not come*; or if he *tenders to the person of the lessor, and he refuses it*, in those cases, if he does not pay within the month, the lessor cannot enter; per Newton. Brooke says, *quare inde*; for it has been used, that if he *demand it the last day of the month*, or the last instant, and the other does not pay, that he may re-enter. But see there, by the opinion of Newton, that the tenant who tenders ought to be there all the day. *Quære inde*; for it suffices to the lessor to come the last instant of the day. Br. Conditions, pl. 60. cites 22 H. 6. 57.

hour of the last day of the month, if the money can be numbered in this time; and so it suffices for the lessor to demand it the same hour. Br. Tender, pl. 41. cites it as agreed, 4 M. 1. in the Serjeants' Cases. —B. N. C. pl. 483. cites S. C.—S. P. Br. Entre Cong. pl. 90. cites 6 H. 7. 3.

2. If a man be *bound in a single obligation*, and no day of payment is limited, this is not payable before *request*; quod nota bene. Br. Tender, pl. 14. cites 14 H. 8. 29.

3. If the lord or his bailiff comes to *distrain* the beasts or goods of his tenant *for his rent behind*, the tenant before the distress (that he may keep and use his beasts or other goods) may upon the land tender the arrearages; and if, after that, a distress be taken, it is wrongful. And if the lord have distrained, if the tenant, *before the impounding* of them, tender the arrearages, the lord

lord ought to deliver the distress; and if he does not, the detainer is unlawful. 2 Inst. 107.

4. Though where the *time* of payment, by force of a condition, being * *indefinite*, the most convenient time is the last hour of the day appointed, in which the money may be told before sun-set; yet if *tender* be made to the person at the place specified, at any time of the day, and refused, the condition is saved, and no new tender need be at the last instant. For by the very letter of the condition the money is to be paid upon the day indefinitely, and convenient time before the last hour of the day is the extreme time appointed by the law, to the intent the one shall not prevent the other, but both be there at the same time. But if both meet at any time of the same day, and the debtor makes tender at the place to the debtee, and he refuses, the penalty is saved for ever. Resolved. 5 Rep. 114. b. Trin. 43 Eliz. C. B. Wade's case.

* S. P. But if by usage of a company, the time of transfer is at a set time, that must be observed. As if the usage be, that the books are open till six o'clock only; the proper time to come will be about five, and to stay till six.

And judgment for defendant per tot. Cur. 12 Mod. 533. Trin. 13 W. 3. Lancashire v. Killingworth, cites Shales v. Seignoret. — 3 Salk. 342, 343. S. C. accordingly. — Ld. Raym. Rep. 688. S. C. & P. accordingly.

5. Condition for payment of money at or before such a day; upon which debt was brought, and the defendant *pleaded*, that he was at the place at a day before, and tendered the money; and that the plaintiff was not there to receive it; and held no good plea. For though he had election to pay before, or at the day, yet he cannot make tender before the day, if plaintiff be not there willing to receive it; and you cannot compel him to receive it sooner. Therefore the last day, which is the day appointed by both parties, they ought to meet, one to tender, the other to receive. Per Cur. 12 Mod. 422. Mich. 12 W. 3. B. R. in case of Hammond v. Ouden.

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(I) Time. Notice. In what Cases, where no Time is limited, Notice must be given.

1. IF a man be bound to pay 20l. at any time during his life, at a place certain, the obligor cannot tender the money at the place when he will; for then the obligee should be bound to perpetual attendance. Therefore the obligor, in respect of the uncertainty of the time, must give the obligee notice, that on such a day, at the place limited, he will pay the money; and then the obligee must attend there to receive it; for if the obligor then and there tender the money, he shall save the penalty of the bond for ever. Co. Litt. 211. a.

2. So if a man make a *feoffment in fee upon condition*, if the feoffor, at any time during his life, pay to the feoffee 20l. at such a place certain, that then, &c. In this case, the feoffor must give notice to the feoffee when he will pay it; for without such notice, the tender will not be sufficient. Co. Litt. 211. a.

See Condition. (F. c.) pl. 1.

2.

P 3

3. But

3. But in both the above cases, if at any time the obligor or feoffor *meets the obligee or feoffee at the place*, he may tender the money. Co. Litt. 211. a.

4. If *A. be bound to B. with condition, that C. shall infeoff D. at such a day*, C. must give notice to D. thereof, and request him to be on the land at the day, to receive the feoffment; and in that case he is bound to seek D. and to give him notice. Co. Litt. 211. a.

5. A bargain and sale of lands was made by A. to B. and C. with a power of revocation upon the tender of 20s. to them, or either of them, at a certain place. The tender was made accordingly; but neither B. or C. was there present, neither had they any notice of the time of the tender. It was held, that this was no performance of the condition, to avoid the bargain and sale. Moor, 602. pl. 833. in Chancery, Trin. 42 Eliz. Lady Burgh v. Williams, Powell, & al'.

6. The defendant was bound to deliver 10 quarters of corn to the plaintiff, at or before such a day; and he pleads that he tendered it to him at such a place before the day, and none would receive it, and does not say that he went to him before to know where he would receive it, and tendered it accordingly; and it was held no good plea. Freem. Rep. 433. pl. 582. Trin. 1676. Harvey v. Jackson.

(K) To whom, and how, to revoke Grants, &c.

Hemley v. Price, S. C. Cro. E. 639. pl. 41. Mich. 40 & 41 Eliz. B. R. reports, that all the Court, except Gawdy, held, that the en-

try is lawful upon the tenant for life, and the frank-tenement being defeated, the * queen's estate is defeated, the being the person against whom the freehold was demandable and recoverable; but that if the queen had had the immediate estate, it had been otherwise.

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1. CONUSEE of a fine made a lease for life to a stranger, remainder to the queen by deed inrolled, upon condition to be void upon tender of so much money to the stranger tenant for life; one question was, whether the tender of this money to the stranger shall devest the remainder out of the queen? Adjudged that it shall devest it without office, because the condition is not to be performed to the queen, but to the tenant for life. Mo. 546. pl. 729. Hill. 40 Eliz. Hemley v. Brice.

2. Power reserved upon feoffment by A. to B. that if A. or his assigns, shall tender 1s. to B. or his assigns, at or in, &c. B. died, leaving a daughter, and his wife enseint of a son; A. pays the 1s. to the daughter, who was not 3 years old, and then revoked and altered the uses; this is a good tender and revocation, Ley, 55. Trin. 15 Jac. Allen's case.

3. A mortgage was forfeited; mortgagor afterwards meeting the mortgagee, said, I have money, now I will come and redeem the mortgage; mortgagee replied, he would hold the mortgaged premises as long as he could, and when he could hold them no longer, let the devil take them, if he would. After
mortgagor

mortgagor went to mortgagee's house, with money more than sufficient to redeem, and tendered it there; but it does not appear that the mortgagee was within, or that the tender was made to him. It was decreed a redemption, and the defendant to have no interest from the time of the tender, because of his wilfulness. Chan. Cases, 29. at the Rolls, Mich. 15 Car. 2. Manning v. Burges.

(L) Tender of Amends. To whom it may be.

1. **TENDER** of amends *to the bailiff* is not good; for he cannot deliver the distress after it is taken, any more than he can change the avowry of his master, &c. Resolved, 5 Rep. 76. a. Pasch. 43 Eliz. B. R. Pilkington's case.

S. C. cited per Cur. Cro. J. 377. pl. 4. in case of Wingfield

v. Bell.——Roll. Rep. 258. in S. C.——Cro. E. 813. pl. 1. Pilkington v. Hastings, S. C. all the Court held that the tender to the servant was not sufficient, especially the master being present at the distress; but if the servant only had distrained, Gaway said, that then the tender to him might have been more colourable: and Popham said, if it had been *to the bailiff of the manor*, it might perhaps have been good, but not to a servant who only joined in the distress; and therefore adjudged for the avowant.——The offer of amends cannot be made *to him that makes cognizance*. Brownl. 173. Hill. 9 Jac. Roberts v. Young.

Holt said, that it was not yet settled whether, *after return irreplevisable*, if party tenders arrears *to bailiff*, it be good to intitle him to act on for *detainer* against principal, though it be so settled in case of tender to principal in CARPENTER'S case, 8 Co. And he said that he was not satisfied with PILKINGTON'S case in that point; for if bailiff may not distrain, nor receive money tendered, why shall his receipt abate a writ? 12 Mod. 354. in case of Horn v. Luines.

(M) Damage feasant. Tender of Amends. At what Time, and how much.

1. * IF a man takes beasts damage feasant, and the other offers sufficient amends, and he *refuses to re-deliver* them, now if he sue *replevin* he shall recover *damages* for the *detinue* of them, and not for the taking them, because the taking was lawful. F. N. B. 69. (G).*

F. N. B. 69. (G) in the new notes there (a) cites 27 E. 3. 8. b. 45 E. 3. 9. But

if the other had them in the pound before amends tendered, it is then too late to tender the amends; and on the avowry the defendant shall have no return till a new tender, and then the party may have *detinue*; quære. 13 H. 4. 17. 14 H. 4. 4. And if he tenders before the taking, the taking is tortious. 7 E. 4. 8. and if immediately on the taking, the detainer is so, and he may recover damages for it, and no return shall be awarded to the lord. 45 E. 3. 9.——S. P. 2 Inst. 107.——S. P. But tender *after impounding* makes neither the one nor the other tortious; for then this comes too late, because then the cause is put to trial at law to be determined. But after the law has determined it, and the avowant has return irreplevisable, yet if plaintiff makes him sufficient tender, he may have action of *detinue* for the detaining them after; or he may, upon satisfaction made in court, have writ for the re-delivery of his goods. 8 Rep. 147. a. b. in a note of the reporter, in the 6 Carpenter's case, cites 13 H. 4. 17. b. 45 E. 3. 9. Regist. Judic. 37.

* S. C. cited 8 Rep. 146. b. per Curiam, in the 6 Carpenter's case. — And in Litt. Rep. 34. Pasch. 2 Car. in C. B. Arg. in case of Beate v. Hodges. — And in Het. 16. S. C. which seems to be a translation from Litt. Rep.

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2. In replevin the defendant avows for damage feasant; the plaintiff replies that the day after the distress taken, he tendered sufficient

When a distress is taken for damage

feasant, the party may tender amends till the beasts are impounded, but after they are in custodia legis, then the tender comes too late. Resolved per tot. Cur. 5 Rep. 76. 2. Pasch.

sufficient amends, viz. 6d. which the defendant refused; upon which the plaintiff *demurred, because the tender was not before the impounding*. Per Gawdy, the tender is good, although the cattle be impounded; and if the party that distrained refuses it, the owner may take them out of pound. And it is clear, if the tender were before the impounding, he might take them out; quod fuit concessum: whereupon the Court gave day to the defendant to shew cause to the contrary, otherwise judgment shall be given for the plaintiff; but Tanfield at the bar said, it was adjudged in Sir HENRY CROMWELL's case in C. B. that tender after impounding comes too late. Cro. Eliz. 332. pl. 10. Trin. 36 Eliz. B. R. Nevill v. Seagrave.

43 Eliz. B. R. Pilkington's case. — Cro. E. 813. pl. 1. PILKINGTON v. HASTINGS AND MEACOCK, S. C. accordingly, and cited 13 H. 4. 7. 27 E. 3. 88. — S. C. cited Litt. Rep. 355. Hill. 6 Car. In C. B. in the case of JENNINGS v. COUSINS, and agreed to be good law, that it ought to be before the impounding. — Het. 165. S. C. accordingly.

Litt. Rep. 355. S. C. accordingly, and Hetl. seems to be only a translation from Litt. Rep. — Freem. Rep. 339. pl. 419. Trin. 1673.

3. In replevin the defendant avowed for damage feasant; the plaintiff replied, that he tendered amends *after the taking, and before the delivery* of the cattle. The whole Court held the replication naught; that the tender was ill, because the words (before the *delivery*) implies that they were impounded; and it is not shewn in certain that the tender was before. And judgment for the defendant. Het. 165. Hill. 6 Car. C. B. Jennings v. Cousins.

AYRE v. RUSHTON, same plea of tender of amends post captionem & ante deliberationem; and the Court resolved it was naught; for the tender ought to be before the impounding, according to PILKINGTON's case. 5 Co. 76. Et ante deliberationem implies, that it was after the impounding, and so comes too late. Twisden said, Perhaps he might mean that the tender was before the replevin, and so might be good by stat. 21 Jac. 1. cap. 16. But per Curiam, that extends only to actions of trespass.

4. Replevin, the defendant justifies damage feasant; the plaintiff replies, that *after the impounding* he tendered amends, viz. 5s. And the defendant demurs, and judgment was given without argument for the defendant; for tender after impounding is too late, and this is not within the statute of 21 Jac. of tender before action brought; for that is in actions quare clausum fregit, and not in replevin. Freem. Rep. 527. pl. 711. Trin. 1680. C. B. Twinning v. Stephens.

5. If beasts have done damage to-day, and gone off, and come again at another time, and are doing damage, and are taken for that, and the owner tenders amends for that damage; the party cannot justify keeping them for the first damage; per Holt Ch. J. 12 Mod. 660. Hill. 13 W. 3. in case of Vasper v. Edwards.

(N) *Tender and Refusal. In what Cases it shall be a Discharge of the Debt.*

1. **I**N debt upon a lease for years rendering rent, a *tender of the rent upon the land, and refusal* by the plaintiff, is no plea. Contra, in an avowry. Br. Avowry, pl. 140. cites 14 H. 4. 4.

2. Where a man is bound in 60*l.* to pay 40*l.* if he pleads *tender of the 40*l.* in action of debt brought against him of the 60*l.** he ought to say that he is yet ready, and always has been to pay the 40*l.* and, bring the money into court, because *the lesser sum is parcel of the greater sum* expressed in the obligation, and the refusal of this shall not serve it; for it is parcel, &c. Br. Tout temps priest, pl. 31. cites 20 E. 4. 1. per Brian & Cur.

tender by the defendant and refusal by the plaintiff is sufficient for the defendant for ever. Br. Tout temps priest, pl. 31. cites 20 E. 4. 1. per Brian & Cur.

3. Where the defendant pleads tender of the money, and brings it into court, and the plaintiff takes another issue for making the defendant to forfeit the whole obligation, if the issue passes against the plaintiff, he has lost the money tendered for ever. Br. Conditions, pl. 171. cites 21 E. 4. 25.

at the day the obligor tenders the money, and the obligee refuses the same; yet in action of debt upon the obligation, if the defendant pleads the tender and refusal, he must also plead, that he is yet ready to pay the money, and tender the same in court; but if the plaintiff will not then receive it, but takes issue upon the tender, and the same be found against him, he has * lost the money for ever. Co. Litt. 207. a. — S. P. Hob. 198, 199. Obiter, in case of Brickhead v. Archbishop of York.

* For he has renounced the condition, and the benefit of it, by not praying judgment for the 50*l.* and there is no confession in this case. Jenk. 102. pl. 99.

The reason wherefore in the case of the obligation, the sum mentioned in the condition is not lost by the tender and refusal, is not only for that it is a duty and parcel of the obligation, and therefore is not lost by the tender and refusal, but also for that the obligee has remedy at law for the same. And in this case *liberata pecunia non liberat offerentem*. Co. Litt. 207. a.

4. If a feoffment be made in mortgage, upon condition that the feoffor shall pay such a sum at such a day, &c. if † tender of the money is made, &c. and the feoffee refuses to receive it, by which the feoffor or his heirs enter, &c. then the feoffee has no † remedy by the common law to have this money, because it shall be accounted his own folly that he refused the money, when a lawful tender of it was made unto him. Litt. sect. 335.

son is, because the money is || collateral to the land, and the feoffee has no remedy therefore. Co. Litt. 207. a.

|| See pl. 8. the case of Genne v. Tinker.

5. Note, that in all cases of condition for payment of a certain sum in gross, touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit, and fully discharged for ever after. Litt. f. 338.

This is to be understood, that he that ought to tender the money is of this discharged for ever to make any other tender, but if it were a duty before, though the feoffor

feoffor enters by force of the condition, yet the debt or duty remains; as if A. borrows 100l. of B. and after mortgages the land to B. upon condition for payment thereof, if A. tender the money to B. and he refuses it, A. may enter into the land, and the land is freed for ever of the condition, but yet the debt remains, and *may be recovered by action of debt; but if A. without any loan, debt or duty preceding, infeoff B. of land, upon condition for the payment of 100l. to B. in nature of a gratuity or gift: In that case, if he tender the 100l. to him, according to the condition, and he refuses it, B. has no remedy therefore; and so is our author in this and his other cases of like nature to be understood.* Co. Litt. 209. a. b.

[191] 6. If a man make an *obligation* of 100l. with condition *for the delivery of corn or timber, &c. or for the performance of an arbitrement of the doing of any act, &c.* this is *collateral* to the obligation; that is to say, is not parcel of it; and therefore a tender and refusal is a perpetual bar. Co. Litt. 207. a.

S. C. cited 6 Mod. 35. per Holt Ch. J. in case of Squire v. Grevil, but cites it by the name of Lutton v. Craiden, in the latter end of Styles, that where a thing is awarded to be done on payment and receipt, tender of the payment and refusal entitles the party to it as much as an actual payment; and said,

7. A. by indenture *articled to pay to B. 110l. at a certain day, and B. by the same indenture articled upon the receipt to give an acquittance, and also to enter into bond of 400l. to A. to save him harmless from all claims to certain lands, &c.* A. tendered the 110l. but B. refused to receive it and to give A. acquittance, and likewise to enter into the bond. After the Court had taken time to advise, Glyn Ch. J. said, that here is no breach of covenant alleged to ground the action upon; for the articles express, that upon the receipt of the 110l. the defendant would give the acquittance and enter into bond, and the breach alleged is, that the plaintiff tendered the 110l. at the day, and the defendant refused to receive it, and has not sealed the acquittance, nor given the bond of 400l. and it may be it was the intent of the parties, that it should be in the election of the defendant either to receive the 110l. or not to receive it, and the plaintiff is not prejudiced by the defendant's not receiving of it; for if he should sue for the 110l. the plaintiff may plead *this tender and refusal* against him, and that *will be judged a payment*, and when he sues you for the 110l. you may sue him for the acquittance and the bond. Nil capiat per Billam, nisi, &c. Style, 481. Trin. 1655. London v. Craven.

that the authorities have been so ever since. — But in 2 Ld. Raym. Rep. 964. in S. C. by name of Squire v. Grevet, it is mentioned as said, by Holt Ch. J. that a tender and refusal has been formerly held no performance without actual payment as in the case of * HUNT v. CRAVEN; but that it has been adjudged otherwise ever since.

* This seems to mean the case of London v. Craven, which is above, and cited contra per Holt, in 6 Mod. 35. for I do not find any other case of like name and like point in all the books of reports.

8. Debt upon a bond, that the defendant and 2 others should perform an award between them and the plaintiff; the defendant pleaded the award, which was, that he should pay to the plaintiff 20s. and likewise 20s. to each of the others; and that he tendered his 20s. which the plaintiff refused to accept. The plaintiff replied, that on such a day, after the refusal, he demanded the 20s. of the defendant, which he then refused to pay. And upon demurrer, the Court held this replication idle, because by the first refusal the 20s. being a *sum collateral to the obligation*, was lost for ever. 3 Lev. 24. Mich. 33 Car. 2. C. B. Genne v. Tinker.

9. Award

9. *Award was to pay 10l. to B. and upon payment B. to release. B. would not receive the 10l. because he would not release. Resolved, B. was as much obliged to release upon the tender and refusal, as if he had actually received the money.* 1 Salk. 75. pl. 14. Trin. 2 Annæ, B. R. Simon v. Gavil.

6 Mod. 33. Squire v. Grevet, S. C. accordingly. — 2 Ld. Raym. Rep. 961. Squire

v. Grevet, S. C. accordingly. — Vent. 167. Mich. 23 Car. 2. B. R. in case of ISAAC v. LEDINGHAM, the same point exactly was cited by Twissden J. to have been resolved. — By tender of the 10l. the obligation is saved. Cro. E. 4. pl. 1. Pasch. 24 Eliz. B. R. Ecclestone v. Mallard.

(O) Tender and Refusal. In what Cases it shall [192] be a Discharge of Interest.

1. IF money be tendered, and *none ready to receive it*, and afterwards he to whom the money is payable *demand the money*, and the other refuses to pay; and afterwards an *action is brought*, and a tender pleaded, defendant shall pay *damages from the time the money was demanded*. Per Cur. Brownl. 71. Pasch. 12 Jac. Anon.

2. Though a *bond* be forfeited, if the money be tendered afterwards, no interest shall be allowed after the tender. Toth. 89. cites 12 Car. Malton v. Pennell.

3. If *mortgagor tenders the money*, and *mortgagee refuses it*, mortgagee shall have no interest from the time of the tender. See (K) pl. 3. S. C. 2 Freem. Rep. 174. pl. 230. 26 Oct. 15 Car. 2. Manning v. Burges.

4. A deed was in nature of a mortgage, and covenant to reconvey on payment. The money was tendered at the day and place, and refused. Decreed the money *without interest from the time of the tender*, and to reconvey; though the plaintiff ought to make oath, that the money was kept, and no profit made of it. 2 Chan. Cases, 206. Trin. 27 Car. 2. Lutton v. Rodd.

5. On a bill to foreclose a mortgage, defendant answered, that 2 *persons* (naming them) offered to pay, and *tendered to the plaintiff all his principal and interest*, then due on the mortgage, and this before a declaration in *ejectment* was delivered; and defendant brought a cross bill to redeem. Decreed the principal, and interest to be paid to the *time of the tender*, at a place and time to be appointed by the Master, discounting the mean profits, &c. Fin. R. 379. Trin. 30 Car. 2. Newby v. Cooper.

6. A. lent B. 1000 l. in London, for securing which, B. mortgaged lands to A. but in the mortgage-deed no place was mentioned where the payment should be. But afterwards B. gave 6 months *personal notice in writing* to A. that he would tender the money and interest *such a day and hour in Lincoln's-inn Hall*, which he accordingly did. B. brought a bill for a re-assignment, and to stop payment of interest. It was insisted, that in this case the tender must be to the person. But Ld. C. King said, that the

the money being lent in town, and personal notice given for payment thereof, and no objection made by A. to the place at the time of the notice, it would be hard to make B. travel with so much money to Oxford, where A. lived; but that *it ought to appear that B. from that time always kept the money ready*: whereas it being proved, that B. was not ready to pay it, the interest must run on. And decreed A. to re-assign to B. or his order. 2 Wms.'s Rep. 378. Mich. 1726. Gyles v. Hall.

7. A. mortgagor, and B. mortgagee in fee, settled an account, and agreed on a day for discharge of principal and interest. B. died before the day, leaving 4 executors in trust for his daughter and heir. A. at the day tendered the whole money to one of the executors, who refused to accept it, because neither of the 4 had proved the will. Then A. tendered it to another, who refused it for the same reason, and because it was in a bank bill; but as to that, A. of himself had proposed to turn it into money, if he objected to the bill. Lord Chancellor held, that though the tender of a bank note might not be, strictly speaking, legal; yet the offering to turn it into money, made it good; that any or either of the executors might have received and discharged the debt, before probate; and that their being executors in trust for an infant, did not put them on a better foot than B. himself would have been, had he been living. And decreed a redemption, on payment of principal and interest to the day agreed upon, and no longer, and no costs on either side; and the infant heir, on payment to the executors, to convey as by the act 7 Anne. Abr. Equ. Cases, 318, 319. Hill. 1729. Austin v. Executors of Sir Wm. Dodwell.

See (Q)
pl. 14.

(P) Tender and Refusal. Bar of Costs and Damages.

1. **A.** Recovered debt, and then brought a new action of debt on the judgment; and defendant pleaded a tender of the money before the action brought, & uncore priſt. The plaintiff could have no costs. Vent. 21. Paſch. 21 Car. 2. B. R. Anon.

3 Salk. 343.

S. C. —

The pleading a tender in assumpsit, may excuse from damages for the delay; but not as to the principal damage.

Comb. 334. Trin. 7 W. 3. B. R. in case of Broome v. Pines.

Tender can be pleaded to an *assumpsit* only in excuse of damages; and if pleaded in bar, it is ill; per tot. Cur. Ld. Raym. Rep. 644. Hill. 12 W. 3. Horne v. Lewin.

3. In an *indebitatus assumpsit*, if the tender had been pleaded at the day of the promise, with *touts temps priſt*, Holt Ch. J. doubted,

doubted, whether it would be in bar of the action or of the damages. He said, that in this action, if it should be in bar of the damages, as it is in debt, it would be a bar of the whole demand; for since indebitatus assumpsit is to recover uncertain damages, the plea which will bar the plaintiff of his damages, will bar him of his whole demand. Per Holt Ch. J. *Ld. Raym. Rep. 254. Giles v. Hartis.*

(Q) Pleadings.

1. **I**N *replevin*, and *avowry* for rent, it is a good plea to say, that he *tendered at the time of the taking*, and the defendant refused, without tender now again; for it shall not be tendered but upon the land; per Cur. Br. Conditions, pl. 38. cites 7 H. 4. 18.

2. A man granted an *annuity* till the plaintiff be promoted to a *benefice*, and in writ of annuity the defendant pleaded that he tendered a competent *benefice* pending the writ, and the plaintiff refused, he need not to tender the arrears incurred before the writ brought; for the *benefice* cannot be always void; and also if the annuity be determined, he shall not recover any thing upon this writ; *quod nota.* Br. Tender, pl. 15. cites 14 H. 7. 31. and 15 H. 7. 1.

3. Debt upon an obligation to pay 10 l. the defendant pleaded tender thereof, and that the plaintiff refused, and issue was not taken upon the refusal, but upon the tender; for there can be no refusal unless there were a tender; and therefore the plaintiff took the refusal by protestation, & *pro placito* that he did not tender. Br. Issues Joines, pl. 91. cites 16 H. 7. 13.

4. If a man be bound by obligation, that J. N. shall perform all covenants contained in such an indenture, of which one is, that J. N. shall * pay to the obligee 10 l. there if he says that J. N. offered, and the plaintiff, viz. the obligee refused, this is a good plea; for though J. N. is a stranger to the obligation, yet the plaintiff is privy. Br. Tender, pl. 1. cites 27 H. 8. 1.

* [194]

Contra if he had been bound to the plaintiff, to pay 20 l. to a stranger, and he refused, there the obligation

is forfeited; and in that case he shall not say that he or J. N. has been always ready, and yet is, because it is for performance of covenants; and also J. N. who is to pay, is a stranger to the obligation; note the diversity. *Ibid.*

If covenant be to pay a sum to a stranger at such a day and place, tender and refusal is no excuse of non-performance; per Holt Ch. J. 12 Mod. 441. Hill. 12 W. 3. B. R. Anon.

5. Debt upon bond conditioned to pay to the obligee, or to his assigns, at such a day and place, 20 s. The defendant pleaded that the plaintiff appointed and assigned one A. to receive the said money of him at the said day and place; and that he tendered it to the said A. who refused to receive it. This was adjudged a good plea, without alleging payment in fact; and it is not like a condition to pay the money to a stranger; for there the payment must be at the peril of the obligor. And Dyer held that the issue would be better on the tender than on the payment; and Leonard and

and Whetly affirmed the same. Mo. 37. pl. 120. Trin. 4 Eliz. Anon.

Anderson
Ch. J. put
a difference
between the
case in 22
H. 6. 57.
and the case
at the bar ;

6. An award was, that the defendant should pay to the plaintiff 10 l. who pleaded that he was ready, &c. and yet is, without shewing any tender; and for that reason it was held ill by the whole Court. Le. 71. pl. 95. Mich. 29 & 30 Eliz. C. B. Brett v. Andrews.

for in our case the obligation doth precede the duty which accrues by the award subsequent, but in the former case the duty did precede the obligation, which was made for the further assurance of the duty; and here the defendant ought to have pleaded the tender. Le. 71. pl. 95. Mich. 29 & 30 Eliz. C. B. Brett v. Audars.

7. Tender of *amends* is no plea, where the *trespass* was voluntary, as for battery, or breaking his close, or putting cattle into his grounds; per Popham and Williams J. Noy, 12. Sir G. Walgrave's case.

Yelv. 59.
S. C. says,
it was ad-
judged una-
voce, that
the payment
belonged to
the lord
without ten-
der; for it
may happen
that the
infant may
be eloiigned,
or travel
beyond sea
in his fa-
ther's life-
time, so
that the
lord cannot

8. In *intrusion, maritagio non satisfacto*, plaintiff did not allege any tender. Upon demurrer to the declaration, all the Court (Gawdy absent) resolved, without hearing of any argument, that for the value of the marriage, tender is not requisite; for it is due de mero jure without any tender, and the *alleging of tender is but surplusage*, and gives colour to traverse it, whereas it is *not traversable*. And Williams said, that he had known it to be so ruled in C. B. and in the Exchequer; wherefore they gave rule to enter judgment accordingly, unless, &c. And at another day Stephens moved to be heard to argue it for the defendant; and Gawdy said, that he much doubted thereof, by reason of the diversity of opinions in the books concerning that question; but because the other justices had resolved it, they without further argument adjudged it for the plaintiff. Cro. J. 66. pl. 6. Pasch. 3 Jac. in B. R. Palmer v. Wilders.

make a tender, and the statute which says, de mero jure, shews that the value is not a thing given by any special law, but by the common law and rule of reason in recompence of the loss of services, which the lord has by the nonage; and also in this action the tender is not traversable. Quod nota.—5 Rep. 126. b. S. C. accordingly. Palmer's case.——In valore maritaggi, it was adjudged upon demurrer, that the tender was not traversable in this action [and that for the reasons mentioned above]. But Warburton said, that for an heir female, because the lord has 2 years after her age of 14 to make tender of marriage, the tender is traversable. Cro. J. 151. pl. 13. Hill. 4 Jac. B. R. the Lord Darcy v. Page.

* [195]

So in debt
upon bond
to pay rent,
&c. the de-
fendant
pleaded that
he was ready
to pay the
rent due
on the pre-
mises, but
nobody was
there to re-

9. An award, that the defendant should enjoy a house for 3 years and a half, and should pay half-yearly for it 13 l. at Michaelmas and Lady-day; and if he failed of payment, the award for enjoying to be void. He pleaded that he tendered the money at the day and place, and that none were there to receive it; but did not set forth that he tendered it at the last hour of the day. It was held not good; and judgment for the plaintiff. Cro. J. 423 pl. 4. Pasch. 15 Jac. B. R. Furser and Bond v. Provd.

ceive it, and that afterwards he did go to pay the money to the plaintiff, but he refused; and upon a special demurrer, the Court held the tender on the land not well pleaded, it not being shewn that it was made in convenient time on the lands, before the justice; but this was cured by pleading the tender to the plaintiff himself afterwards. And adjudged for the plaintiff. 1 Linn. 590. Pasch. 9 W. 3. Keating v. Irish.

10. Where

10. Where upon a demise *rent is covenanted to be paid at a place certain*, and an action is brought for the rent, it is no good plea by the defendant that he made a tender of the rent, unless he plead the tender to have been made at the place where the rent was agreed to be paid; and judgment was given accordingly. Freem. Rep. 148. pl. 169. Pasch. 1674. Marshall v. Wisdale.

11. Tender and refusal is no plea in *debt on bond to save harmless* from another bond. Vent. 261. Trin. 26 Car. 2. B. R. Anon.

12. Debt by A. against W. upon *bond*, conditioned to pay money for B. (*who had entered into a bond to pay the same*) to A. the obligee at his house on the 27th of July, if he would deliver up the first bond uncanceled, and assign the same to W. the defendant. W. the defendant pleaded, that B. did not pay the money, whereupon the defendant went to A.'s house on the 27th of July an hour before sunset, and there staid till after-set, paratus to pay the money, but that A. was not there, nor any other for him ready to receive it, or to deliver up the bond, & hoc, &c. The plaintiff demurred generally, and had judgment; for per tot. Cur. this plea was ill, for want of *obtulit solvere*, because the tender, and not the paratus, is traversable, and the tender must be made before the other is bound to deliver up the bond. 3 Lev. 103. Pasch. 35 Car. 2. C. B. Cole v. Walton.

13. Case, &c. by husband and wife for money lent by the wife *dum sola*; then they allege a special request by the wife *dum sola*, and another by the husband after the marriage. Defendant pleaded in bar, that he was always ready to pay, &c. and that he tendered it before the action brought; and upon demurrer to this plea, the plaintiffs had judgment, because it appeared that the tender was pleaded after two requests, one by the feme *dum sola*, and the other by the plaintiffs after marriage. 1 Lutw. 224. Hill. 2 & 3 Jac. 2. Johnson & Uxor. v. Mapletost.

14. Where a tender and refusal is pleaded either on a single bill, or other simple specialty, the defendant need not conclude in bar to the action, but only in discharge of the damages; for in this case the tender is not a discharge to the action, or to the payment of the money, which is still due notwithstanding the tender; for that is only to excuse the damages; per Holt Ch. J. Carth. 133. Pasch. 2 W. & M. B. R. Anon.

15. But where tender and refusal is pleaded in an action for a penalty on a bond, with a condition to pay a lesser sum, there the defendant must conclude in bar to the action, because a tender of a less sum on the day had discharged the penalty; and therefore it is a good bar to the action brought for the penalty; per Holt Ch. J. Carth. 133. Anon.

16. In rescous, &c. the plaintiff declared, that he had distrained 5 bags doing damage, &c. and would have impounded them, and had actually put one in the pound, &c. The defendant pleads, that after the taking, and before the rescous, he tendered to the plaintiff 10s. which was a sufficient amends; and upon demurrer

The reporter adds, nota also, that in both these cases the pleader ought to conclude with a *proferat hic in curia*. Carth. 133.

the Court were all of opinion, that the *tender came too late for the damage done by that hog which was in the pound*, and therefore he *should have traversed that one hog was in the pound.* 2 Lutw. 1259.

* [196] Trin. 7 W. 3. Alwaies v. Broom.

But in debt for rent the defendant pleaded a tender after imparlance; and it was adjudged a good plea. Comb. 50. Pasch. 3 Jac. 2. B. R. Dalby v. Smith. — In debt on bond, conditioned to

17. *Indebitatus assumpsit*, &c. for several sums upon several promises; defendant after an imparlance alleged, that the several sums, for which the plaintiff had declared, amounted to 66 l. and as to 64 l. 7 s. part thereof, he pleaded non assumpsit; and as to the rest he pleads in bar, that the * several promises set forth by the plaintiff were but one contract for an horse, and that before the action brought, he tendered the residue, (viz.) 1 l. 13 s. to the plaintiff, which he refused; and that he was and still is ready to pay the same, &c. Upon a demurrer, it was resolved, that the plea was ill by reason of the imparlance, and also because it is uncertain upon which of the promises the money was tendered. 1 Lutw. 238. Hill. 11 W. 3. Morris v. Coles.

a sum certain, a tender may be pleaded *after imparlance.* Per Holt Ch. J. *Ld. Raym. Rep.* 254. Mich. 9 W. 3. in case of *Giles v. Hartis.*

18. He that makes a tender, must stay till *sun-set*, unless special circumstances set forth make alteration. 2 Salk. 624. pl. 3. Trin. 13 W. 3. B. R. in case of *Lancashire v. Killingworth.*

Salk. 623, pl. 2. Hill. 10 W. 3. B. R. Sweetland v. Squire. S. P. and seems to be S. C. only the year is mis-printed 10 W. 3. instead of 10 Annæ. Besides that, I have a MS. report of the case of Sweetland v. Squire as in Hill. 10 Ann. B. R. accordingly.

19. *Indebitatus assumpsit* was brought for goods sold and delivered, defendant pleaded in bar, that before the time of bringing the action he made tender of the money, and that ever since the tender paratus fuit to pay the money. It was insisted, that the bar was not complete enough; for he should have pleaded, that he has been ready to pay the money, not only ever since his tender, but from the time the goods were delivered, viz. from the time the money became due. And the Court seemed to think this a material objection; for it may be the money was demanded before the tender, and then there is a good cause of action. 10 Mod. 81. Hill. 10 Ann. B. R. Whitlocke and Squire.

Tender and refusal is no plea in *assumpsit*; but the defendant must pay the plaintiff when he will have it; per Holt. *Cumb.* 334. Trin. 7 Ann. B. R. Broom v. Pine.

20. In an action of debt, by an officer of a borough, for a copy of the poll at an election of burgesses for parliament, the defendant pleaded, that he was ready to pay what was due for the copy. And the Court agreed, that the tender was good; for till the officer demands something, or delivers a copy of the poll, the party cannot know what to tender. As where there is a demand for a copy of a commitment. &c. upon the statute 31 Car. 2. it is only necessary to say, that he was ready to pay for it. And so a judgment was affirmed by all the Judges, and afterwards it was affirmed in parliament. *Cornys's Rep.* 279. 288. pl. 153. Pasch. 4 Geo. 1. Philips v. Smith.

21. A motion to set aside judgment signed after plea of tender delivered, the defendant was by rule obliged to plead an issuable plea; a tender is no issuable plea within the meaning of this rule; therefore the judgment was held good. *Rep. of Pract. in C. B.* 134. Mich. 10 Geo. 2. *Daverhill v. Barret.*

(R) Pleadings. In what Cases a *Refusal* must be
alleged as well as a Tender.

1. *A.* Promised to pay *B.* such a sum of money at such a place, and in consideration thereof *B.* promised, *on payment of the said sum, to surrender to A. a lease for years.* *A.* tendered the money, and *B.* did not surrender the lease. *A.* brought assumpsit against *B.* and alleged, that he obtulit the sum; but does not say, that *B.* refused, and therefore it was held not good. And Coke said, that WITTENHALL's case was adjudged, that tender, *without alleging a refusal*, is not good. Cro. E. 889. Trin. 44 Eliz. *B. R. Lea v. Exelby.* [197]

S. C. cited
per Cur.
Vent. 109.
in case of
Buckler v.
Millerd.

2. Action upon a *promise*, that the defendant, in consideration that the plaintiff would pay him a certain sum of money, promised to assign him a term; and the plaintiff averred a tender of the money, but that the defendant did not assign. And after verdict it was moved in arrest of judgment, that the plaintiff did not entitle himself to an action, for that he did *not aver a refusal, though he had averred a tender*; but it was there adjudged well after verdict; but also held, that it would be bad on demurrer. Sid. 13. pl. 3. Mich. 12 Car. 2. *B. R. Ball v. Peake.*

S. C. cited
12 Mod.
530. per
Holt Ch. J.
in case of
Lancashire
v. Killing-
worth.—
And in Ld.
Raym. Rep.
687. in S. C.
— And in
Comyns's
Rep. 117. in S. C.

3. An agreement was made by one to build a house, and for that the other was to pay him so much money for building. The plaintiff averred, that he made a tender to build the house, but not that the other had refused to suffer him to build it. All the Court were of opinion, that the tender, without averment of a refusal, was not good; but being after verdict it was held well. 2 Lev. 23. Mich. 23 Car. 2. *B. R. Opy v. Peters.*

Vent. 177.
214. Peters
v. Opie, S. C.
— 2 Saund.
350. S. C.
S. C. cited
by Holt Ch.
J. 12 Mod.
530. in case
of Lanca-

shire v. Killingworth.— And in 2 Salk. 123. in S. C.— And in Ld. Raym. Rep. 687. in S. C.— And in Comyns's Rep. 117. in S. C.

4. Debt upon bond to pay 12 l. on 15 Aug. and on 15 Feb. by equal portions. The defendant pleaded, that on 15 Aug. there was 6 l. due, and no more; and that he (the defendant) on the said 15 Aug. at *B.* obtulit solvere the same, and was ever afterwards ready to pay it; and after that, (viz.) on the 1 Decemb. &c. did pay it to the plaintiff, which he did accept, unde petit judicium, &c. Upon demurrer the whole Court held the pleading insufficient, because it is not said that the plaintiff offered. otherwise if a place of payment had been in the condition, and it had been shewn in pleading, that the party who was to receive the money was not there, and the acceptance after the day signified nothing. 2 Vent. 107. Mich. 1 W. & M. in C. B. *Buckler v. Millerd.*

S. C. cited
12 Mod.
530. per
Holt Ch. J.
in case of
Lancashire
v. Killing-
worth.

5. Defendant covenanted with the plaintiff, that upon two days notice, within a year, to be given at Hudson-Bay House, he would accept

Ld. Raym.
Rep. 687.
S. C. accord-

ingly.—
2 Salk. 623.
pl. 3. S. C.
And per Cur.
when both
parties meet
at the time
and place, he
that pleads a
tender must
also plead a
refusal,
otherwise
such a plea
is naught
upon de-
murrer. but

accept of 1000l. stock in such a Company, and would pay 2000l. at the transferring thereof. The declaration avers, that within the year, viz. such a day, he left *notice in writing* for K. the defendant, to come to Hudson's-Bay House the 4th of November, which was also within the year, *to accept the transfer*; that the plaintiff was there on the same day *ready, and did tender a transfer* of the said stock to the defendant; but that the defendant did not come and accept it, or pay the 2000l. Per Holt Ch. J. he ought to have *averred the tender and refusal*; and in that case to aver a tender, without averring a refusal likewise, would not do. 12 Mod. 529. Trin. 13 W. 3. Lancashire v. Killingworth.—Cites 16 El. 31. 17 Ed. 3. 11.

good after a verdict; and if the defendant be absent, he must shew that, and also that himself was at the time and place, and tendered.—S. C. cited 8 Mod. 106. in the case of Blackwell v. Nash.—Comyns's Rep. 116. pl. 81. S. C. accordingly; and that in such cases the later way of pleading is, that the defendant did not come, nor any other for him, though this is not of necessity; for if a man pleads a tender and refusal, it is sufficient to shew the refusal, without saying at what time the refusal was; for a refusal by the party, at any time or place, is sufficient. But if a man pleads notice given, by which it appears that the defendant was not present when the act ought to have been done, then the plaintiff must say that he was ready at such a time, viz. to the last part of the time when the thing was to be done; and that the defendant, or any for him, did not come. And the reason of all those cases is, that when the plaintiff himself is to do an act, and that act is not done, he ought to shew to the Court that he had done every thing that was in his power, and cited Hob. 107. 1 Cro. 694. 8 Co. 92. And therefore judgment was given for the defendant by the whole Court.—3 Salk. 342. S. C.

[198]

(S) Bar, in what Actions.

In replevin the defendant avowed the taking the cattle damage-feasant. The plaintiff replied, and disclaimed any title to the place where, &c. but set forth, that his cattle entered into the defendant's ground against his will, and did

1. **REPLEVIN** of 300 sheep. As to 200, the defendant pleaded *ne prist pas*; and as to 7, he took them damage-feasant; and as to the rest he said *we pursued them by reason of the 7, absque hoc that we took them.* The plaintiff maintained the taking all, except the 7; and as to the 7, he said *we met you immediately upon the taking, and proffered 6d. for the damages*; and averred, that the damages did not amount to more, judgment, &c. Horton demanded judgment; for now you have confessed the taking rightful, and therefore ought to have writ of detinue. Per Hull; the chasing after the tender was tortious. Defendant said, he took and impounded them before he tendered. Skrene, immediately upon the taking we tendered; prist; and the other e contra. Therefore it seems that replevin lies after the tender. Br. Replevin, pl. 21. cites 12 H. 4. 23.

damage; and that immediately after the trespass, he tendered to defendant 5s. amends, which he averred was sufficient, but defendant refused, &c. Upon demurrer the Court gave judgment *una voce* for the avowant; for they were of opinion, that the statute 21 Jac. extends not to this case, but only to actions of trespass, and not to replevins, which remain as they were at common law; and therefore it is clear that the tender ought to be before the impounding. 2 Lutw. 1594. Hill. 9 W. 3. Allen v. Bayley.

In replevin the defendant avowed for damage feasant; the plaintiff replied a tender of amends after the taking. It was moved in arrest of judgment, that the tenders not being pleaded to be before the impounding, this is determined to be bad upon a general demurrer in Lutw. 1596. and therefore he thought it might be taken advantage of as well in this way. The Ch. J. said, that case was certainly law; and PILKINGTON's case, 5 Coke, is to this purpose; but he observed, that the defendant had joined issue upon the sufficiency of amends; and by that means had waived, as to the irregularity of the tender. But he owned, that if this action had been in trespass, it would have been otherwise, even upon

upon a general demurrer; for this statute says in general, that a tender of amends may be well pleaded in trespass before the action brought. Barnard. Rep. in B. R. 309. Pasch. 2 Geo. 2. C. B. Baker v. Johnson.

2. *Refusal of a stranger to the obligation*, is a good plea in bar. Br. Tender, pl. 12. cites 15 E. 4. 5.

Br. Conditions, pl. 62. cites S. C.

3. Trespass of breaking his close, and spoiling his grass, the defendant said, that the trespass did not exceed 10s. and he tendered him sufficient amends. And it was held no plea, but a void tender. Contrary in avowry for damage-feasant, elsewhere. Br. Trespas, pl. 214. cites 21 H. 7. 30.

S. P. And the defendant pleaded that he tendered sufficient amends, and the plaintiff re-

fused the same, and demanded judgment, &c. And upon a demurrer, the opinion of the Court was, that this is no plea in trespass, but in a replevin it is a good plea. Sed non dixerunt causam diversitatis. Ow. 48. Mich. 32 & 33 Eliz. Kent v. Wichall, cites 21 H. 7. 30. 9 H. 7. 21. F. N. B. 69. (G) 31 H. 4. 17.

4. 21 Jac. cap. 16. s. 5. enacts, That in all actions of trespass, *quare clausum fregit*, wherein the defendant or defendants shall disclaim, in his or their plea, to make any title to the land in which the trespass is by the declaration supposed to be done, and where the trespass is by negligence or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was done by negligence, or involuntarily, and to tender or offer sufficient amends for such trespass before the action brought; whereupon, or upon some of which, the plaintiff or plaintiffs shall be forced to join issue; and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs be nonsuited, such plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suits concerning the same.

It was agreed, that in trespass the defendant may plead the trespass to be involuntary, and disclaim in the title, without pleading the statute of 21 Jac. for it is a general statute.

Litt. Rep. 355. Hill. 6 Car. C. B. Jennings v. Cousins.

* *Trespass quare clausum fregit*. The defendant pleaded according to this statute, that he tendered amends before the action brought, viz. the 2d Oct. 7 Car. The plaintiff replies, that before such tender he sued a latitat, teste the last day of Trinity Term before, and upon that procured the defendant to be arrested, intending to declare in trespass. It was thereupon demurred, and resolved, that this tender came too late; for as well as a tender after an original writ comes too late, so after an arrest upon a latitat; for the tender by the statute is intended to be immediately after the trespass, and before any suit commenced; wherefore it was adjudged for the plaintiff. Cro. C. 264. pl. 11. Trin. 8 Car. B. R. Watts v. Baker.—See (M) pl. 4.

* [199]

5. Where a custom was to be excused from suit of court by payment of 8d. to the lord, and 1d. to the steward by copyholders living at such distance, and such excuse to be for a year, it was held by all, that tender and refusal was as much as payment. Vent. 167. Mich. 23 Car. 2. B. R. Isaac v. Ledgingham.

6. A man cannot plead a tender and *touts temps priſt* in a *quantum meruit*, because the demand is entirely uncertain; nor could a man plead tender of amends in bar of any voluntary trespass at common law, except in case of damage-feasant, to prevent the impounding of cattle, until the statute of 21 Jac. 1. cap. 16. *Ld. Raym. Rep.* 255. Mich. 9 W. 3. in case of Giles v. Hartis.

For more of Tender in general, see Condition, Rent, Stocks, *Tout temps priſt*, and other proper titles.

Tenures.

(A) Tenures. *Antiquity.*

Whether these tenures were introduced here by Will. the Conqueror, or were in use here before his coming, has been a matter much disputed, and many learned men have been

[1. **I**N the escuage and roll in the county of Lincoln with Master Bradshaw in the Exchequer, upon a voyage into Scotland, anno 1 E. 3. Rot. 17. there is *comes Albemarle tenet Helewell per baroniam de domino rege in capite de Conquestu*; and in the same roll, another holds of such who holds of such honor, *de Conquestu*; and others hold of such an one who holds over by a *knights fee*, &c. *de Conquestu*, and so in divers other rolls of it. But always it is said to be *held of the king de Conquestu, and not of any other*. But it is there many times said, that such an one holds of the king, *and of others also, de antiquo feoffamento*; and of others, *de novo feoffamento*. Quære, what is intended thereby?]

engaged in the controversy; but it seems that the greater part of those who were particularly learned in matters of antiquity, were of opinion agreeably to Roll, that the Conquest was their utmost era.

* *Feodum antiquum* is that which has been in some of the family of the present possessor, of whatever kindred they were of the father's side, for more than 4 descents. *Feodum paternum*, is that which has been held by his lineal ancestors to the 4th degree, as avus proavus, abavus, atavus. And *feodum novum*, is that which was first given to the person enjoying it, and which he came not into by succession to his father. See Spelm. Gloss. 220. verbo Feudum. — Freigius de feudis, is much in the same words with Spelman.

† Ancient fee is where the feodary and his ancestors time out of mind, have held such a fee, and here the feodists place a medium between these two, viz. paternal fee which comes by four degrees of descent, and they define that to be the ancient, which descends from more. Cowel's Institutes, lib. 2. tit. 3. s. 9.

Dr. Brady, in his Introduction to Old English History, 187. cites the following records, thereby to explain the meaning of the novum and vetus feoffamentum, viz.

† [200]

Carta Albani de Hairun.

Domino suo excellentissimo Henrico regi Angliæ Albanus de Hairun, vestræ excellentiæ notifico, quod ego, in Hertfordscira feodum unius militis de veteri sefamento, de vobis principaliter teneo, & quod de novo sefamento nichil habeo, nec militem feoffatum aliquem habeo valete.

Carta Matthæi de Gerardi-villa.

Matthæus de Gerardi villa tenet in capite de domino rege feodum unius militis de veteri sefamento & nullum habet militem sefamentum [feoffatum] nec habet aliquid de novo.

Carta Willielmi filii Roberti.

Karissimo domino suo Henrico regi Angliæ, Willielmus filius Roberti salutem; sciatis quod de vobis teneo feodum unius militis pauperrimum, nec alium in eo feodavi, quia vix mihi sufficit, & sic tenuit pater meus. Valete.

And pag. 188. adds, that, by these records the meaning of vetus & novum feoffamentum is very apparent; that it was called so in respect of time only, and not in respect of the original feudataries, or their sub feudataries or tenants in capite, and tenants by mesne tenure in military service. — And *ibid.*

ibid. pag. 215. cites Jani Anglorum facies nova, pag. 236, &c. where speaking of vetus & novum feoffamentum that author says, that the old feoffment was of such fees as were granted from the crown, and that the new feoffment was of such fees as were granted by the tenants in capite to others by sub-infeodations, or such as the tenants in capite held by mesne tenure; the Doctor observes, that the word feoffment is derived from the French word fiefment, which signifies infeoffing, or giving of a fee, and that from the word fief, a fee; that in the writings of the feudists, we find vetus feodum & novum, and cites Hotton. de Feud. disput. c. 6. coll. 819. B. that an old fee is that which was given by the predecessor of the present lord, or which was granted to the predecessor of the vassal; for always an old fee is so called, in respect it hath descended or gone in succession; but a new fee is that which is given by the present lord to the present vassal; and again in lib. 2. Feud. tit. 3. sect. That is called a new fee which was given to the present feudatory; and that is called an old one, which was given by his parents or ancestors.

The Introduction to the Law of Tenures, pag. 25. (m) as to the antiquum & paternum, cites Crag. de Jure Feud. fol. 6. that paternum sive antiquum dicitur id, in quo quis patri, avo aut alicui majorum succedit. And quod jure successionis ad aliquem devolutum Stry. Exam. Jur. Feud. cap. 3. Q. 9. quicunque ex superioribus id acquisivit. Feud. lib. 2. tit. 5. And as to the novum, quod de novo acquisitum fuit & habet initium in persona investiti, nec a progenitorum successionem provenit, cites Zasius in usus Feud. fol. 6. Crag. de Jure Feud. fol. 55. Hanneton de Jure Feud. 30. and Stry. Exam. Jur. Feud. cap. 3. Q. 12.

(B) *What Things may be held.*

[1. **A**N *advowson in gross* lies in tenure. 42 E. 3. 7. 1 H. 4. In quare impedit, the plaintiff intitled himself that the
1. b. 21 E. 3. 5. b. admitted. 25 E. 3. 54. admitted.
Contra, 33 H. 6. 35.]

advowson was held of him by homage and fealty, and was appropriated in mortmain, and it is not contradicted, but that the advowson well lies in tenure, and it was brought by a common person against an abbot. Br. Tenures, pl. 15. cites 21 E. 3. 5. — And such a case the same year, fol. 29. by the Earl of H. against the Dean and Chapter of H. and was of an advowson in gross, and counted that it was held of him, and that it was aliened in mortmain, and he presented as lord immediate within the year, nota. And tit. Quare Impedit, 73. it is admitted, that advowson in gross of a pro voftry, may well be held in capite, and thereby the king shall have the prerogative of all his other lands held of others; and in another quare impedit after the king counted that the advowson in gross was held of him, and made title by descent to 4 daughters, and that the youngest was in his ward, and admitted for good; quod nota. Br. Tenures, pl. 15. cites 21 E. 3. 5.

The king counted of advowson in gross held of him, and that the tenant died without heir, by which he presented, and well; quod nota of advowson in gross in tenure. Br. Tenures, pl. 10. cites 24 E. 3. — Br. Quare Impedit, pl. 99. cites 24 E. 3. 69. S. C.

In quare impedit, the plaintiff counted that J. N. held of him certain lands and advowson in chivalry, and entitled himself to the presentation by ward of the heir, &c. and the other made bar. And so it seems that an advowson lies in tenure. Br. Tenures, pl. 18. cites 24 E. 3. — And in a quare impedit, 14 H. 7. 6. & 15 H. 7. 8. it is agreed that the advowson lies in tenure, scil. advowson *which was appendant to a manor, and is severed after*, and this by the justices, and that a common person may give it to hold of him; but quare inde, and where he shall distrain; for if he can have no means to come to the tenure, then it seems that the advowson in gross cannot lie in tenure, for cessavit & præcipe quod reddat, does not lie. Br. Tenures, pl. 18. — See pl. 7.

Advowson may lie in tenure. As where manor and advowson are held, and the advowson is made in gross, the advowson is held pro particula; per Littleton and others for the best opinion. And per Davers and Heuxst [Hengton] cessavit lies of advowson, and in writ of right of advowson the summons shall be at the church or at the doors thereof. And grand cape lies in it, and the lord may distrain in the gliche, scil. the beasts of the patron, but not the beasts of the incumbent or parson. Br. Tenures, pl. 4. cites 33 H. 6. 34.

Writ of right of advowson shall suppose that he holds the advowson. Br. Tenures, pl. 18. (bis) cites 14 H. 7. 26. & 15 H. 7. 8. — See Pl. C. 498. b. 499. a. in the case of Grendon v. the Bishop of Lincoln.

* [201]

[2. *Land held since time of memory becomes a priory*; this shall not destroy the tenure. 42 E. 3. 7.]

[3. *Land which has been a priory time out of mind, &c.* may be held. 42 E. 3. 7.]

4. *Pifchary* does not lie in tenure; for the soil may be to one and the pifchary to another, and then the lord cannot distrain. Br. Tenures, pl. 75. cites 32 E. 3. Fitzh. Scire Facias, 100.

5. It was agreed that *remainder* is held, and by escheat thereof the feignlory is extinct, and the lord may have action of waste, as he in remainder might have had in his life. Br. Tenures, pl. 107. cites 3 H. 6. 1.

6. Assise of certain *wax and cotton to make a taper to burn in the church of Laiton* in the county of Essex, and the abbot of Stratford brought thereof assise for the not rendering thereof, and it was held *rent service* and a good tenure; and yet he should not have thereof any profit nor avail, and because he should have distress in the land of the defendant, therefore tenure. Br. Tenures, pl. 50. cites 35 H. 6. 7.

* See pl. 1. 7. In quare impedit, it was said, that *mesnalty* lies in tenure by a mesne, contra of an * *advowson*; for this is *appendant to the land or manor* to which, &c. but not *parcel*. So of *common*, and *villein regardant*, way, courts, leets, waifs, strays, &c. for *those do not lie in tenure unless of the king*; for he † may distrain in other land; contra of a common person; quod nota, by the opinion of the Court. But advowson lies in tenure, per Vavisor and Davers, contra Townsend and Brian. Br. Tenures, pl. 34. cites 5 H. 7. 36.

† All the editions are (ne poit) cannot, but misprinted.

See (E)

[B. 2] Of what Thing to another.

See (G) pl. 5. S. C.—
Tayle (A),
pl. 1. S. C.

What is taken in within the crotchets is supplied out of the Year-book to make the meaning more clear.

Br. Tenures, pl. 58. cites 19 E. 2. & Fitzh. Assise 399.

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[1.] [4.] IF a mesne gives the *menalty in tail*, the law will create a tenure between the donee and donor. 1 H. 4. 3. b.]

[2.] [5.] A man may hold land of 2 manors. 17 E. 3. 13.]

[3.] [6.] As a man [seised of 3 manors] might before the statute [make feoffment to another in fee] and so now [since the statute, make feoffment] in tail, [he] may give parcel of one manor and parcel of another manor to hold by certain services, [as one tenancy,] and the services shall be regardant to both [all] the manors. 17 E. 3. 13.]

4. Where a man holds of another of his manor by suit to his mill, and the lord grants the mill and suit, yet the heir of the lord shall have the suit, if he makes a new mill; for the tenure is to the manor of the grantor or to his person, and not to the mill, which suit remains with the other services. Per Henle. Quære, Br. Assise, pl. 458. cites 31 E. 1. & 19 E. 2.

(C) *What Services may be reserved. Against the Law.*

Fol. 500.

[1. **A** Man may hold by *marchet* [agreement] that when his daughter or sister commits fornication, or be espoused without leave of the lord, that he shall pay 5s. 8d. to the lord; for he may bind him to it by his own agreement. 15 E. 3. Aid. 33. admitted.]

2. A man, before the statute, by feoffment, and at this day, by gift in tail, may reserve tenure to make a beacon or to make a bridge at B. or to keep the castle of the king adjoining to the sea; and this is good, inasmuch as he has advantage thereof, because it is for the commonwealth, and so he had advantage; contra if he gives land to one to give rent to a stranger, or * to ride along with a stranger; for there is no commonweal. But gift of land to find a chaplain to chaunt in a certain place is good tenure; because he has benefit by reason of orizons. 11 H. 7. 12. b. pl. 3. per Fineux.

Br. Tenures, pl. 109. cites S. C.

* Original is (equit').

3. A reservation of things which lie only in prender or usage, cannot make a tenure; and therefore if a man seised of land and wood, before the statute of quia emptores terrarum, does thereof enfeoff a stranger, and after the said statute gives the same land and wood in tail, or leases the same for life unto a stranger, reserving unto the feoffor, donor, or lessor common for 4 beasts in the same land, and to suffer the feoffor, donor, or lessor to take yearly in the same wood 3 loads of estovers for fuel; this reservation is void to make any tenure, and this cannot be said a reservation, because the feoffor, donor, or lessor cannot take profit thereof but only by his own act, and a man cannot do service unto himself; and therefore such reservation is void, if it be not by deed indented, and then he shall take the same by way of grant of the feoffee, donee, or lessee. Perk. f. 702.

(D) In what Cases it may be created by express Words. Of what Thing by the King. See (E).

[1. **THE** king may grant his *fee-farm* of a vill, and reserve a tenure. 44 E. 3. 45. 1 H. 4. 3. b. 44 Aff. 22. by all the justices.]

S. P. And the king may distrain in all other lands of the

party for such things as he reserves upon the tenure of the rent. Contra of a common person. Brooke says, and so see that the king may reserve tenure upon a rent which does not lie in tenure. But it was said, that if a common person gives his seignior to hold of him, this is good; but the land of tenant shall not be charged with distress, unless the beasts of the grantee [grantor] come there, by the best opinion. Br. Tenures, pl. 7. cites 44 E. 3. 35.

[2. The king may grant † a rent to be held of him, and this shall be a good tenure. † 10 H. 6. 12.]

† S. P. And by alienation thereof

without licence, the king may seize. Br. Tenures, pl. 93. cites 3 E. 3. Fitzh. Avowry, 732.

† Br. Tenures, pl. 98. cites S. C.

Q. 4

[3. And

[3. And the king may grant *this seigniorie over, and the rent shall be held of the grantee.* 10 H. 6. 12.]

[4. The king may grant *a seigniorie over to hold by certain services of him.*]

5. Where the king gives land, and reserves some tenure in special, the tenure shall be such as it is reserved, be it socage or otherwise. And if he grants land, and reserves nothing, nor speaks of any thing, in this case the grantee shall hold in chivalry for the non-certainty; *quod non negatur.* Br. Tenures, pl. 3. (bis) cites 33 H. 6. 7.

6. Archbishop of C. was seised of the manor and borough of S. in right of his bishopric, and the prior of M. was seised of a house held of the said archbishop, as of his said manor, &c. Afterwards in 30 H. 8. the archbishop gave the said manor and borough, with confirmation of the dean and chapter, to the king. Then the said prior surrendered, and so the king was seised of the manor and borough, and likewise of the said house. The king by letters patents gave the house and other lands to J. S. and T. S. in fee, *tenend' in libero burgagio per fidelitatem tantum & non in capite, pro omnibus serviciis & demandis.* Afterwards E. 6. gave the manor and borough to the mayor and commonalty of London. J. S. and T. S. convey the house to W. in fee. W. died without heir. The question was, what tenure was reserved by the words and grant by H. 8. to J. S. and T. S.? It was said, it could not be a tenure *in burgage*, because no rent is reserved, according to Litt. f. 162, 163, 164. And Anderson Ch. J. at the first strongly insisted upon it. Another matter was, that one tenure only is reserved for all the lands and tenements; so that, should the tenure reserved be adjudged to be burgage, then lands at the common law out of boroughs should be held in burgage; besides, a tenure in burgage cannot be created without these words, *ut de burgagio*; and to that purpose Shute J. agreed. 4 Le. 207. pl. 333. Mich. 32 Eliz. B. R. Waite v. Cooper.

(E) Tenure created by express Words. Of what Thing. By common Person.

[1. *A Seigniorie* may be granted at the common law by a common person, reserving a tenure for the possibility of distress by the escheat of the tenancy. 44 Ass. 22. Quære.]

[2. [So] if mesnalty be given in tail, a tenure may be reserved of it for the possibility of the distress by the escheat of the tenancy. 1 H. 4. 1. b.]

[3. So if a man holds a manor by certain services, those services may be granted (it seems it is intended in tail) to hold by certain services. Dubitatur. 14 H. 6. 24.]

Br. Tenures,
pl. 105. says,
for Mer.

[4. A common person cannot grant a rent to be held of him. 10 H. 6. 12.]

B. B. Among the additions of escheat, that rent lies in tenure, and writ of escheat lies thereof, supposing

supposing that it is held, &c. and yet the land is held in fact; quod nota; therefore quære of this book. And in the additions of ejectione custodiæ, there it is said that writ of ejectione custodiæ lies of rent, 13 E. 3. But Parn. and Trew. held, that rent does not lie in tenure; and so is the law, unless of the king, as it seems.——And Br. Intrusion, pl. 8. cites 11 H. 4. 82. and says, that rent does not lie in tenure; per Norton Arg. But per Hank. if there be lord, mesne, and tenant, and the mesne dies, and a stranger gets the rent, the lord shall have writ of ward, supposing the rent to be held of him; and if the mesne dies without heir, he shall have writ of *assize*, supposing the rent to be held. Per Hill, it may be that he shall have such writ, but in the count he shall declare that the land is held by the rent; and in your case if he demands the ward, he shall say terram suam tenuit, &c. without saying any thing of the rent; and by him this default in the count shall abate the whole count and the whole writ, because it comes by his own shewing; and cites Mich. 19 E. 3. Fitzh. tit. * Gard. 40. to the same purpose; and so, he says, it seems that it shall abate.——Br. Escheat, pl. 7. cites S. C.——Br. Tenures, pl. 14. cites S. C. * [204]

5. If a man be seised of a manor in fee, in which manor there is a mill for the grinding of wheat and other grain, and before the statute of quia emptores terrarum he does infeoffe certain tenants of the manor of parcel of the manor, *doing suit at his mill*; this is a good tenure by the word (doing). Perk. f. 638. cites 9 Aff. 24. & M. 9 E. 3. 35.

6. A man may hold of *J. W. as of his manor*, but not as of his *house*. Br. Tenures, pl. 47. cites 8 H. 4. 1. per Gascoigne.

7. And a man may hold of the king, or of a common person, *as of his person*; and so is 2 H. 4. 3. quod nota bene; for it is good law. Br. Tenures, pl. 47. cites 8 H. 4. 1. per Gascoigne.

8. If a man had given land to an abbot or prior in fee before the statute of quia emptores terrarum, *to find a lamp*, &c. this is a tenure, as appears in a cessavit. Br. Tenures, pl. 62. cites 45 E. 3. 15.

9. Avowry made for tenure of 10 acres of land for *suit to the leet* of the defendant. And per Fineux Ch. J. a man may hold by suit to the leet, and to be *crier at the leet*, or to be *collector of amercements of the leet*, or to *repair a bridge, high-way*, or the like, or to *keep a beacon* for fear of enemies, or the like. Br. Tenures, pl. 35. cites 12 H. 7. 18.

10. The king may licence the tenant to give in tail to hold of himself, and so, to make feoffment to hold of himself and the king; and other lords may license the tenant *paravail* to make feoffment in fee to hold of himself; and this notwithstanding the statute of quia emptores terrarum; for this was made in advantage of them, and therefore they may dispense with it; per Fitzherbert J. Br. Tenures, pl. 2. cites 27 H. 8. 26.

(F) Of whom [a Man] shall hold by Creation † of the King [or others]. At Common Law.

† These words seem not to belong to this division.

[1. BEFORE quia emptores terrarum, if the tenant had made feoffment in fee, the feoffee should hold of his feoffor and not of the lord paramount. 4 H. 6. 20. † 3 Aff. 8. contra 33 E. 3. Annuity, 52.]

† Fitzh. tit. Affise, pl. 182. cites S. C. Br. Tenures, 24. cites Br. Tenures, pl. 21.

S. C. accordingly, though in the grant no mention was made of whom he should hold.——

pl. 21. cites 4 H. 6. 20. S. P. per Cottismore. But if he had said *tenendum de capitali domino*, he should hold of the chief lord.

If he had made the feoffment generally without reservation of any tenure, the feoffee should have holden of the feoffor, as he held over; for example, if he had holden by knights service, the feoffee, by creation of law, had holden by knights service of [the feoffor, in respect of the tenure over by him; and therefore, if the lord had confirmed the estate of the feoffor, viz. the mesne to hold by fealty only (which was socage) the tenure between the tenant and the feoffor should be socage also; because the tenure created by law follows the tenure, in respect whereof it was created. 2 Inst. 501.

[2. [But] if tenant in tail makes feoffment in fee, feoffee shall hold of the lord paramount, and not of the donor. 48 E. 3. 9. b. 4 H. 8.]

[3. So if tenant in tail lease for life, which is a discontinuance, by which he has a reversion in fee, he shall hold of the lord paramount. 4 H. 6. 21. quære.]

[205]

Where there is lord and tenant by fealty, or otherwise,

[4. If since [the statute de] donis, the tenant gives in tail the donee shall hold of the donor, and not of the lord paramount. 4 H. 6. 20, 21. b. adjudged. 3 Aff. 8. Dub.]

and the tenant in feoffment N. who gives to the son of the tenant in tail, *tenendum de capitali domino*, and the donee dies, the issue shall hold it of his donor, and he over of the lord, but the issue in tail, nor the tenant in tail shall not hold of the lord immediately; per Danby Ch. J. clearly; quod nota, and so is 4 H. 6. But Littleton made a doubt, because no notice was given to the lord of the feoffment. Br. Tenure, pl. 37. cites 2 E. 4. 6.

Where tenant of the king gives in tail, the king may choose to

[5. So if the tenant of the king gives in tail, the donee shall hold of the donor, and not of the king. 4 H. 6. 22. b. adjudged.]

to take the tenant in tail for his tenant or the donor, and this as well before licence as after licence, for the licence of alienation is a pardon for the trespass, but this is no conclusion to the king; but if he takes the one for his tenant, as by the ward of the heir of the one, or the like, he shall not have the other after; for he has determined his election; per Fitzherbert J. But see contra 4 H. 6. 20. per Judicium. Br. Tenures, pl. 2. cites 27 H. 8. 26.

[6. If before quia emptores a man had aliened in fee by deed, reserving a rent, this should create a tenure without doubt. Contra, 33 E. 3. Annuity, 52.]

Fol. 501.

[7. [So] if before quia emptores terrarum a man had aliened in fee reserving a tenure to his heirs, this had been a void reservation, and by creation of the law he shall hold of him as he holds over. Co. Litt. 99. b.]

8. In assise [it was said] for clear law, that where city, borough, or vill, is leased to the mayor, burghers, &c. in fee-farm, those who hold burgages or land therein hold them immediately of the mayor, burghers, and corporation, and not of the king immediately. Br. Tenures, pl. 57. cites 49 E. 3.

9. It is a law ordained, that if a man aliens in mortmain, and the king seises and grants it over; this shall be held of the chief lords. Br. Tenure, pl. 3. (bis) cites 33 H. 6. 7.

10. When a man made feoffment of parcel of his manor before the statute to hold of him, this was intended to hold of the manor, and not of his person in gross; quod nota. Br. Avowry, pl. 60. cites 22 H. 6. 50.

11. If before the statute of quia emptores terrarum, there had been father and 2 daughters, and the father, being seised of one

one acre of land, enfeoff thereof his eldest daughter to hold of him and his heirs by fealty and 12d. and the father dies, and the seignory descends unto the two daughters; now the eldest daughter shall hold of her younger sister by fealty and 6d. Perk. f. 656.

12. If a man seised of land in fee in right of his wife, and before the statute of quia emptores terrarum, the husband alone enfeoffs a stranger, without saying more, the feoffee shall hold of the husband by such services as the husband and his wife held over; for the husband alone did not hold over. But if the husband and wife had joined in the feoffment, to hold of the husband, these words (to hold of the husband) are void. And the feoffee shall hold of the husband and wife by such services as they held over; so that if the husband dies, and the wife after his death accepts of the services from the feoffee, she shall not avoid the feoffment in a cui in vita. Perk. f. 660.

And if the husband and wife had joined in the feoffment, to hold of the wife without more saying, the feoffee shall hold of the husband and wife; so that if the wife dies,

the feoffee shall hold of the husband until the feoffment be avoided by the heir of the wife in a cui in vita, &c. and then the heir shall hold of the lord paramount. Perk. f. 660.

(G) What Tenure the Law will create without express Reservation. [206]

[1. **FEOFFEE** before quia emptores should hold by the same services as feoffor held over. 45 E. 3. 15. b. 3 H. 6. 11. Co. Litt. 99. b.]

And so should the heirs of the feoffee; but if the

feoffor himself holds over by knights service during his life and no longer, and that after his death his heirs shall hold by fealty only, or by other services, now the feoffee and his heirs shall hold of the feoffor and his heirs by like services, mutatis mutandis. Perk. f. 698.

[2. [So] feoffee of part, before the statute, should hold by the same services as feoffor, &c. 3 H. 6. 11.]

If before the statute of quia

emptores terrarum, there were 2 jointenants of lands or houses in fee, which they held by fealty, and 2 s. rent, or by fealty and a horse, and they enfeoff a stranger of the lands or houses to hold of one of them by fealty and 12 d.; the feoffee should hold the moiety of him by fealty and 12 d. because by the feoffment he did depart but with a moiety in right, and yet he shall have the whole rent which is reserved, notwithstanding that it be a severable rent, because it is reserved only to him, and he may well reserve the same unto him alone, notwithstanding that he joined in feoffment with his companion, &c. And the feoffee shall hold the other moiety of the other jointenant (to whom the reservation was not made) by fealty, and 12 d. rent, and he and his companion shall hold together the whole land over by 2 s. because then the rent is severable, and if they themselves hold the same land over by a horse, then it is said, that the feoffee shall hold the same moiety of him by fealty and a horse. Tamen quære, because he was party unto the reservation made unto his companion, &c. But if the jointenants had enfeoffed a stranger to hold both of them, or of one of them, and expressed no services, they are void words, and the feoffee shall hold of them as they held over. Perk. f. 652.

[3. [So] if before quia emptores, the tenant by knight service granted the land tenendum per 1 d. for all services, & faciendo capitulis dominis feodi debita servitia pro predicto, though by the first words he should hold without more words by socage, yet by the last words he should hold by such services as he held over. 49 E. 3. 11. Curia.]

For the tenant shall not do the service to the chief lord as for himself, but for the co-nusor, [of

the line by which the grant was made,] who is his mesne, and so he holds of the mesne immediately by those

those services; and therefore the issue taken was, whether the mesne held over of the lord paramount in chivalry, or in socage, and not whether the tenant [plaintiff] held of the defendant his mesne, in chivalry or in socage; quod nota. And per Persey, by this tenure, viz. faciend' servitia debita capitali domino, &c. he shall pay the rent, &c. to him for the mesne, but shall not do homage, fealty, &c. which are services corporal; for those shall be done by the mesne himself. Note the diversity. Br. Tenure, pl. 10. cites 49 E. 3. 10.

Perk. f. 635. S. P. of a fine by grant and render, and says, that in this case the conusee holds of the conusor by knight service, notwithstanding that he expressly says that he shall do the services capitalibus dominis; for by these words in this case he shall not hold de capitali domino, because there is a tenure before expressed in the fine, viz. by these words, reddendum inde ad festum, &c. which words make a tenure of the conusor; so that if he shall hold de capitali domino, then he shall hold the land of two several lords, which the law will not suffer in this case. But if these words were not in the note of the fine, viz. reddendum inde ad festum, viz. annuatim, &c. pro omnibus serviciis secularibus & demandis, then by the other words the conusee ought to hold of the lord paramount by the like services as the conusor held, &c.

* [207]

Co. Litt. 143. a. S. P. [4. If a *tenant gives in tail*, donee shall hold by the same services as donor holds over. 1 H. 4. 2. 4 H. 6. 20. adjudged; —Litt. f. 19. S. P. that for donor has the ward of the donee. Co. Litt. 23.]

donee shall hold by the same services as donor does to his next lord paramount, except the *donees in frankmarriage*, who shall hold quietly from all manner of services, unless from fealty, till the 4th degree past, and then the issue shall hold of the donor, or his heirs, as they hold over. — And Coke in his comment, pag. 23. says, the reason is, that when by construction of the statute of W. 2. there was a reversion settled in the donor, by reason of the donee's having an estate of inheritance, the judges resolved that he should hold of his donor, as his donor held over; as if the tenant had made a feoffment in fee at the common law, the feoffee should have holden of the feoffor as he held over; and before the statute of W. 2. the donee had holden of the donor as of his person, and now of * him as of his reversion; but if a man makes a † *lease for life, or years, and reserves nothing*, he shall have fealty only, and no rent, though the lessor holds over by rent, &c. And this that Littleton says is regularly true, if the donor makes no special reservation; for then the special reservation excludes the tenure which the law would create.

† Co. Litt. 143. a. S. P.

If he gives the tenancy in tail tenendum de capitalibus dominis, this tenendum is void, because that the law has made a tenure betwixt the donor and the donee, &c. And then if the tenendum should be good, he should hold the same land of 2 lords, which the law will not suffer; if not, that it be by matter of conclusion, &c. Perk. f. 637. — 2 inst. 505. S. P.

Lord, mesne, and tenant were, the [5. So if a *mesne gives the mesnalty in tail*, the donee shall hold of him by the same services as he holds over. 1 H. 4. 3. b.] mesne acknowledged by fine surrender to hold in tail by 1d. and rendering to the lord the services due. And by some, the tenant shall hold of the conusor, and shall not render the services, but only for the conusor, and not for himself; Quære. Br. Tenures, pl. 51. cites 21 E. 3. 49.

The reason why donee shall not hold by grand serjeanty is, because [6. [But] if *tenant by grand serjeanty of the king gives in tail*, the donee, though he cannot hold by grand serjeanty, yet he shall hold by knight service, because it was included in grand serjeanty. Co. Litt. 23.] no man can hold by grand serjeanty but of the king only; and therefore since grand serjeanty includes knight service, he shall in this case hold of the donor by knight service. Co. Litt. 23. a.

Br. Tenures, pl. 10. cites S. C. per Persey, quod Belk. omnino concessit. — [7. If there be *lord, mesne, and tenant by knight service*, and the lord releases to the mesne to hold in socage, the law will alter the tenure of the tenant; for he also shall hold in socage [only]. 49 E. 3. 10. b.] So if the mesne releases to the tenant, the tenant shall hold per eadem servitia & consuetudines, as the mesne did. 2 inst. 502.

As if the tenant holds by 4 d. and [8. If there be *lord, mesne, and tenant by several services*, and the tenant gives in tail, and after the donor dies without issue, by which his

his reversion escheats to the mesne; in this case the donee shall hold as the mesne holds over, and not as the donor held, because the mesnalty is now extinct. Co. Litt. 23.]

the mesne by 12 d. and the tenant gives in tail without re-

serving any thing; so that he [the donee] holds by 4 d. in respect of the tenure over, and after the reversion escheats, now donee shall hold by 12 d. For the mesnalty, which was 4 d. is extinct, and the law reserved the tenure upon the gift in tail, in respect of the mesnalty; and when the mesnalty is extinct, the former rent between the donor and donee is extinct also; and then by the same reason that the donee shall take advantage, if the donor by release or confirmation had holden by lesser services, by the same reason he shall be prejudiced when he holds by greater services. Co. Litt. 23. a.

[9. If a man *seised in fee in right of his feme, tenant by knight service, gives it in tail*, it seems that the donee shall hold this of him by knight service; for till the feme, or her heir, purges the discontinuance, the baron and his heirs shall hold it of the lord paramount by knight service. Contra, Co. Litt. 23.]

Co. Litt. 23. a. says, the donee shall not hold of the baron by knight service, be-

cause his wife held the land, and the baron had nothing but in her right; and in that case the baron had gained a reversion by wrong; and therefore such a donee shall do fealty only.

If husband seised of land in right of his wife, makes a feoffment in fee, the feoffee shall hold as the wife held; for the husband had nothing but in her right. 2 Inst. 502.

[10. If *tenant by knight service makes gift in tail, reserving fealty and rent*, the donee shall hold in socage by fealty and rent. Co. Litt. 23.]

11. It seems, that if a man gives land *pro homagio & servitiis* to J. N. rendering 6 d. that he shall render 6 d. and fealty, but not homage; for this does not come in reddendo. Br. Tenures, pl. 78. [208] cites 28 E. 3. Fitzh. Avowry, 141. Brooke says, quod quære; for it is not so said there.

12. If 2 jointenants were of land, and before the statute of quia emptores terrarum one of them infeoffs a stranger of what thereof belongs unto him, without reserving any thing, the feoffee shall hold of his feoffor, by the moiety of the services by which the feoffor and his joint companion held over, if they held over by several services, &c. And notwithstanding this feoffment the feoffor, and he, who was his joint companion, shall hold the same land over of their lord as they held before, so as the avowry of the lord is not altered by this feoffment. Perk. f. 653.

(H) What Tenure the Law will create upon Extinguishment of the Tenure.

[1.] If a mesnalty comes by escheat to the lord, the feigniory is extinct, and yet the lord shall hold by the same services as he held before. Co. Litt 99. b.]

2. If there are lord, three daughters mesnes, and tenant, and two of the daughters release to the tenant or purchase of the tenant, there they two hold two parts of the lord paramount by extinguishment of the mesnalty, and the third part of the other sister; so that the lord shall make several avowries, and shall have several actions; and in the case of the release the tenant shall hold two

parts

parts of the lord paramount, and the third part of the sifter who did not release. Br. Tenures, pl. 23. cites 36 H. 6. 7.

Litt. f. 140. S. P. and Coke, pag. 99. b. in his comment thereupon, says, that hereby it appears that if the seignior be transferred by act in law to a stranger, and thereby the privity is altered, then the tenure in frankalmoin is turned to a

3. *Lord, mesne, and tenant by frankalmoigne*; the *mesne dies without heir*; the tenant shall hold of the lord by such services as the mesne held of the lord; because the lord cannot have the same services of the tenant as the mesne had; for *service of frankalmoigne remains always in the blood of the donor*, and no other can have them besides the donor and his heirs, &c. *But if the lord can have the services which the mesne had before of the tenant*, then he shall not have the same services as he had of the mesne before. 7 E. 4. 12. a. per Needham.

4. *As if there are lord, mesne, and tenant, and the tenant is an abbot in jure ecclesie, and holds of the mesne by 12d. and fealty, and the mesne holds over of the lord by 20s. &c. in this case if the mesne dies without heir*, the tenant shall hold of the lord by 12d. only, because the lord is nearer to the land than he was before, and so may have the same services as the mesne had, &c. 7 E. 4. 12. a. per Needham.

tenure in socage by fealty, and that this new tenure created by law shall, upon the escheat, drown the seignior; for *always the seignior, nearer to the land, drowns the seignior which is more remote off*; and yet the lord in this case, to whom the mesnalty is escheated, shall hold by the same services that he held before the escheat.

[209] (I) Of whom he shall hold. By express Reservation.

[1.] *If at common law the tenant made feoffment tenendum de capitalibus dominis*, he should not hold of the feoffor, but of the lord paramount. 4 H. 6. 20.]

[2. *If tenant, since donis conditionalibus, gives in tail tenendum de capitalibus dominis*, yet he shall not hold of the lord paramount, but of the donor; for the donor has a reversion, and so a tenure incident thereto, and therefore shall not hold of both. 4 H. 6. 21. b. 2 H. 4. 6.]

* Fol. 502.

R. C. was

seised of two manors in fee, and held them of the king in chivalry in capite, and had issue A. and B. and leased the manor to C. for term of his own life, and the remainder to B. his younger son, in tail tenendum de capitali domino; the remainder to the right heirs of the donor. And the donor died; and the remainder descended to A. the eldest son, and B. the youngest son entered as in his remainder; and the king was always seised of the services by the hands of A. and not by the hands of B. And afterwards B. died, H. his son within age; and it was found by false office, that B. was seised in fee, and held of the king in chief, and died seised his heir within age. And came A. the eldest son, and traversed the office for this matter. And it was demurred for the king; and after great argument it was awarded, that the hands of the king should be removed, and that A. should be restored to the ward; for it was agreed, that *this remainder to the right heirs of R. the donor, is only a reversion*; for the fee was never out of him. And where the king has a very tenant in fee-simple, so long as the fee is not out of him, so long he rests tenant of the king; and he shall have the escheat of him, if he be attainted of felony; and also the king cannot have two several tenures of one and the same land, simul & semel, that is to say, one of the donor and another of the donee; and therefore if the donee shall be immediately tenant to the king, then the donor shall hold of none; which is not so, but the donee shall hold of the donor, and the donor of the king, ut ante donum. And per Hau and June; at the first it was in the election of the king to have elected the donor or the donee for his tenant; but where by the acceptance of the king of the services by the hands of the heir of the donor, he shall hold of him. But the judgment was as above; therefore Brooke says, it seems to him that this opinion is not law. Br. Tenures, pl. 21. cites 4 H. 6. 20.

Where there is lord and tenant by chivalry, or otherwise, and the tenant in fee gives to the son of the tenant in tail tenendum de capitali domino, and the donee dies, the issue shall hold it of his donor, and he over of the lord; but the issue in tail, nor the tenant in fee, shall not hold of the lord

lord immediately; quod nota, per Danby Ch. J. for clear law, and so is 4 H. 6. But Littleton makes a doubt, because no notice was given to the lord of the feoffment. Br. Tenures, pl. 37. cites 2 E. 4. 6.

[3. So if the *tenant of the king* gives in tail *tenendum de capitalibus dominis*, yet he shall hold of the donor, and not of the king; for the said words are void. 4 H. 6. * 41. b. CHAMPERNOUN's case adjudged.]

* This seems to be misprinted, there being no such page, and should be

4 H. 6. 20. b. — Br. Tenures, pl. 21. cites S. C. accordingly, that those words, if referred to the donee, are void; but where gift is made in tail, the *remainder over in fee*, there the tenant in tail shall hold of the chief lord. Note the diversity. Per Cheyney and Martin, justices.

If the *tenant of the king* gives in tail, and the *tenant in tail dies seised*, the king shall not have any thing thereby; for the *tenant in tail holds of his donor*, and the king may receive the rent and services of the donor by the hands of the tenant in tail, and yet he holds of the donor. Per Wood, Keble, and Tremaine, J. quod affirmatur per omnes. Br. Tenures, pl. 96. cites 4 H. 7. 16.

[4. At the common law, before the statute of *quia emptores terrarum*, if a man had *granted land to hold of his heirs*, it would be a void reservation to his heirs, and the law would create a tenure of himself, as he held over. Co. Litt. 99. b.]

See Reservation (C), pl. 4.

[5. If *lands held of a common person* come to the king by *escheat* by attainder of the tenant of *treason*, and the king grants those lands to another by these words, *tenendum de capitali domino per servitia debita & consueta*, they shall be held of the chief lords as they were before, and not of the king. † 33 H. 6. 7. by Prisot. Co. 6. MOLYNS, 6. Resolved.]

† Br. Tenures, pl. 3. cites S. C. — S. C. cited and relied strongly on, per Cur. 6 Rep. 6. a. in Molyne's

case, and says, that with this accords 8 E. 3. 283. And as to the case of 27 H. 8. [which is † at Br. Parliament, pl. 77. and is in at tit. Statutes (E. 8) pl. 2. and at pl. 9. below] it was answered and resolved, that that case was not like to this case, for a saving cannot save that which is not in esse; but in the said book (of 27 H. 8.) it is further said, viz. that (here are not words of gift or reviving); but that here in the case at bar, (viz. Molyne's case,) the grant of the king amounts in judgment of law to a reviving of the ancient seigniority. Hill. 40 Eliz. in Scaccario. — S. C. of Molyne, cited 8 Rep. 77. a. and affirmed for good law.

† [210]

[6. If the *king lord*, *B. mesne*, and *C. tenant*, are of a manor, and the *tenant is attainted of treason*, and office is found thereof, and after the king grants the manor to *J. S. in fee tenendum de nobis heredibus & successoribus nostris, & aliis capitalibus dominis feodi illius per servitia inde debita & de jure consueta*; this shall revive the tenure of the mesne, and of the king as lord paramount. Co. 6. MOLYNS, 5. b. 6. Resolved.]

This case was affirmed for clear law. 9 Rep. 131. a. Trin. 9 Jac. in the court of wards, in Bewley's case, which

see infra, pl. 20.

So if the *king be lord*, *A. mesne*, *C. mesne*, and *D. tenant*, and the *tenancy comes to the hands of the king by forfeiture or conveyance*, the king grants the lands to another in fee, (*tenend' de capitali domino per servitia debita, & consueta*.) this grant shall revive not only the immediate tenure of C. but of A. and of the king also; albeit the *tenend' de capitali domino* be in the singular number, (as the statute speaks,) yet it is as much as *capitalibus dominis*. 2 Infl. 501, 502.

[7. But in the said case, if the king grants the land to *J. S. tenendum de nobis*, this shall not revive the tenure of the mesne, but he shall hold of the king only. Co. 6. MOLYNS, 6.]

[8. If the king purchases land held of other lords, all the seigniories by this are extinct; and if the king afterwards grants the land

land to another to hold of him, he shall hold only of the king.
47 E. 3. 21. b.]

See supra,
pl. 5, 6. in
the notes.—

If the king
has a tenancy
by forfeiture
or purchase,
if he does by
covin alien
them to hold

of himself, the lord may sue by petition, and have a scire facias against the patentee to repeal the patent and to reseise the land, and then it shall be granted tenendum de capitali domino. F. N. B. 159. (A) in the new notes there (c) cites 20 Ass. 124. 46 E. 3. Petition, 19. 17 E. 3. 59. but says it is intended of an alienation in fee, and cites 3 E. 3. 10.

10. A. acknowledged to B. by *fine for term of his life tenendum de capitali domino*; and the fine was rejected by reason of the reversion in the conusor. But it was received *tenendum of the conusor, and rendering to the chief lord the service due for the conusor, quod nota*, and not for himself. Br. Tenures, pl. 67. cites 14 E. 3. and Fitzh. Fine, 55.

11. Fine was levied to A. to hold of the donor in chivalry, the remainder to B. in tail to hold of the donor by the 12th part of a knight's fee, and doing to the chief lord the service due for the donor; and it was received; for then the donee shall make 2 escuages, one to the donor, and another to the chief lord for the donor; and therefore these words (*doing to the chief lord*) were ousted, &c. and see there that the tenant for life may hold by one service, and be in remainder by another service. Br. Tenures, pl. 68. cites 19 E. 3. and Fitzh. Fine, 71.

[211] 12. If there were lord, mesne, and tenant, and before the statute the tenant infeoffs a stranger of the tenancy, to hold of the lord paramount, the same is void. But if the feoffment were made to hold of the mesne, it were good; and he shall hold of him by the same services, which the feoffor held of the mesne; but the tenant cannot make a new tenure between his mesne and his feoffee by new services; for to the services reserved, the mesne is a stranger. And if the tenant had *enfeoffed a stranger*, before the statute, &c. to hold of him and the mesne, the feoffee should have holden only of his feoffor. Perk. f. 667. cites T. 7 E. 4. 11. and P. 2 E. 4. 5.

13. And if the tenant before the statute had *enfeoffed J. S. to hold of the mesne and T. K.*, the feoffee should have holden only of the mesne. Perk. f. 668.

14. If before the statute there had been a woman seignioress, and tenant, and the woman had taken husband, and the tenant *enfeoffed a stranger to hold of the husband*, it is a void tenure, and the feoffee shall hold of his feoffor, &c. Perk. f. 668.

15. And if there had been 2 joint lords and tenant, and before the statute the tenant had *enfeoffed a stranger to hold of him, and*
one

one of the joint lords, it is a void tenure, and the feoffee should hold of his feoffor. Perk. f. 668.

16. If lord and tenant had been before the statute of 2 acres of land, and the tenant had thereof enfeoffed a stranger to hold one acre of the lord paramount, and to hold the other acre of himself, the same is good, &c. Perk. f. 670.

So if there had been lord and 2 joint tenants, before the statute, &c.

and they had enfeoffed a stranger, and one of them had assigned the feoffee to hold of the lord paramount, and the other had assigned the feoffee to hold of himself, &c. the same had been good, &c. Perk. f. 669.

17. If lord and tenant had been before the statute, &c. and the lord granted his seigniorie unto a stranger, and the tenant enfeoffed another stranger to hold of the grantee of the lord, the same had amounted unto an attornment, and also to make a new tenure; and yet the grantee is a stranger unto the reservation of the seigniorie between the grantor and the tenant. But as to that, it may be said, that there is a *privity by matter en fait*, viz. by the grant with the attornment; and so it shall be, notwithstanding the lord had granted it unto the use of the grantor, &c. And the same law is where a *mesnalty escheats*, mutatis mutandis. Perk. f. 669.

18. If the feoffor, &c. or donor, &c. or lessor for life, had reserved unto him upon the feoffment before the statute; or had reserved unto him upon the gift or lease, after the said statute, *knights service, or fealty, and 10 s. or a horse, &c.* and dies, his heir shall have only fealty; because the reservation does not extend unto the heir of the feoffor, donor, or lessor. Perk. f. 699.

19. Tenant for life and tenant in tail are not wholly excluded out of the statute of *quia emptores*, &c. cap. 3. by force of the words there (in feodo simplici); for where the whole fee simple passes out of the feoffor, there this act extends to estates for life and in tail, as if an estate for life or in tail be made of land, the remainder in fee, there then tenant for life or in tail shall hold de capitali domino by force of this act; but otherwise it is when a reversion remains in the donor or lessor. For if a man at this day make gift in tail, tenend' de capitalibus dominis feodi, &c. these words are void, and he shall hold of the donor. 2 Inst. 505.

20. Tenant was attainted of treason, and his manor, &c. forfeited to E. 2. who granted the same to J. S. in fee, *tenendum de nobis, & hæredibus nostris per servitium feodi militis in perpetuum*, and 10 l. rent, *et faciendo aliis capitalibus dominis feodi illius, si qui fuerint, redditus & servitia inde debita antequam ad manus nostras taliter devenerunt, salvis nobis & hæredibus nostris feodis militum, &c.* Resolved by the 2 chief justices, and chief baron, that the tenure of the mesne is revived, notwithstanding the king first of all reserved to himself other services, viz. knight service, where the mesne before the attainder held of the king in socage; and though the king has reserved other rent, yet because * the king, for his honour, &c. expressly intends to revive the mesnalty, (which by the tenant's attainder was extinct, according to the rigour of law), the clause of revivor

* [212]

Ibid. 131. the reporter cites 2 E. 3. 33. or 60. b. 8 E. 3. 283. 17 E. 3. 59. b. 25 E. 3. 46. 46 E. 3. tit. Petition, 19. 49 E. 3. 10. 22 Aff. 53. 31 Aff. 30. 4 H. 6. 20. 33 H. 6. 7. And says, nota upon

the said
books a di-
versity be-
tween cre-
ation of a

new tenure without any aspect to an ancient right, for there the first reservation shall stand and between restitution of an ancient tenure; for this shall be preferred before the reservation which is mentioned first. Nota a good diversity.

shall be construed to precede, and the restitution of an ancient right shall be preferred. 9 Rep. 130. b. 131. Trin. 9 Jac. in the Court of Wards. Bewley's case.

See (F. a)
pl. 17, 18.

(K) *Upon what Reservation [the Tenure] shall be by Knight Service of the King, and where without Reservation. Tenure by Knight Service of the King.*

* Br. Te-
nures, pl. 3.
at the end.
S. P. cites
S. C.

[1.] If the king grants land and reserves no manner of thing, nor speaks of any thing in this case for non-certainty, it shall be adjudged by knight service. * 33 H. 6. 7. by Prisor. Co. 9. Lowe, 123.]

Br. Te-
nures, pl. 7.
cites 44 E.
3. 45.

[2. If the king grants the farm of a vill in fee to hold of him by the services due and accustomed, this shall be a tenure by knight service; for it shall be by the services which are most for the king's advantage, scilicet, by knight service. 44 Aff. 22. by all the justices adjudged. 44 E. 3. 45.]

† Br. Te-
nures, pl. 7.
cites S. C.

[3. So if the king leases for life a farm of a vill, and after confirms to him in fee to hold, per servitia inde debita & consueta, it shall be by the services which are most for the king's advantage, that is to say, by knight service. 44 Aff. 22. adjudged † 44 E. 3. 45.]

So where
the king
granted
lands tenen-
dum de no-
bis, &c. by

[4. If the king grants land, and reserves 10 s. rent a year, and does not mention how it shall be held, it shall be held by socage, in as much as there is a special reservation made. See 33 H. 6. 7.]

the service of a red rose yearly at the feast of St. John the Baptist *pro omnibus aliis servitiis*. It was objected that tenure cannot be by service of a rose only *pro omnibus aliis servitiis*, because homage, or fealty at least, is incident to every tenure; and therefore since other services shall be annexed, it shall be such as is the best for the king and the most high, which is knight service, and this for the uncertainty. But resolved, that since fealty is incident to every rent-service, the law annexes fealty to the said rent, and then the words *pro omnibus aliis servitiis* shall be intended such services which the law does not imply or add thereto; so that the tenure shall be by a rose and fealty. 6 Rep. 6. b. 7. a. Pasch. 43 Eliz. in Scaccario, Wheeler's case. — Cites S. C.

† Br. Te-
nures, pl. 3.
cites S. C.
But Brooke
says, quere

[5. If the king grants land *absque aliquo inde reddendo*, yet he shall hold by knight service. Co. 9. LOWE, 123. † 33 H. 6. 7. by Prisor.]

Hoc. — But it was resolved, that by operation of law, it shall be held of the king in capite by knight service, according to the rate and proportion of the land which belongs to a knight's fee: and the principal case is more strong, because the king, upon the grant of the services, limited the tenure to be by fealty only for all services, exactions, and demands. 9 Rep. 123. b. Trin. 7 Jac. in the Court of Wards. Anthony Low's case.

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[6. The beginning of a manor was, when the king gave 1000 acres of land, or a greater or lesser parcel of land unto one of his subjects,

subjects, and his heirs, *to hold of him and his heirs*, which tenure is knight service at least. Perk. f. 670.

(L) Tenure in Capite. *What Person may create it.*

[1. *A* Count palatine, who has *jura regalia* granted to him, may create a tenure in capite to hold of himself; for by the grant it is in a manner disjoined from the crown and out of the king, (and he is made a petty king.) Da. 1. County Palatine, 62. 66.] See (M) Pl. 4.

[2. *But it seems the king cannot grant such power to a particular man, without granting such royal jurisdiction as the count has.*]

[3. It appears that land was held of the earl of Chester in capite. D. 13 El. 303. 19 El. 359.]

[4. So land was held of the Bishop of Durham in capite. D. 277. 10 El. 277. 57.]

[5. *But a tenure in capite cannot be created by a subject who is merely in condition of a subject, and has no such power granted to him.* Da. 1. 66. b. D. 30 H. 3. 44.] Tenure in capite is only of the person of the king, and

not where he holds of him as of an honour, manor, castle, &c. unless of certain ancient honours as appears in the Exchequer, and likewise how a man shall hold of the king, and of the ancient lord by recovery by default in præcipe in capite, where the land is not held of the king in fact, and this by reason of the conclusion. Br. Tenures, pl. 65. cites F. N. B. fol. 5. — Br. Tenures, pl. 99. cites S. C.

No tenure created by a subject, though it be a tenure in gross of his person, can by any possibility grow or aspire to be a tenure in capite of the king. And therefore if the prince or other subject create such tenure of his person, and after is made king, this does not become tenure in chief. Arg. Dav. Rep. 59. a. in the case of the county palatine of Wexford.

[6. *As the prince cannot create a tenure in capite.* D. 30 H. 8. 44.] See (L. 2) pl. 11.

[7. Land cannot be held of the duke of Cornwall in chief by knight service. P. 9 H. 5. B. R. Rot. 85. admitted. Contra 43 Aff. 15. admitted.]

(L. 2) * *What shall be said a Tenure in Capite.*

[1. *A* Man may hold of the king in capite as of an honour, which was the ancient inheritance of the crown; this appears by the writ founded upon the statute of 1 E. 3. cap. 12, 13. quod vide Fitz. Na. 175. a. where Fitzherbert observes this accordingly. It seems the reason is, because by prescription the tenements held of those ancient honours have used to draw the same prerogative as other tenures in capite.] See (A. 2). * Tenure in capite ex vi termini, is a tenure in gross, and it may be holden of a subject; but being spoken generally, it is secundum excellentiam

intended of the king; for he is caput reipublicæ. Co. Litt. 73. a.

Regularly a tenure of the king, as of his person, is a tenure in capite, so called propter excellentiam, because the head is the principal part of the body, and he that holds of any common person as of his person, he in truth holds in capite; but again, propter excellentiam, it is only in common understanding applied to the king, and that a feignory of a common person is called a tenure in gross, that is, by itself, and not linked or tied to any manor, &c. Co. Litt. 108. a.

Br. Te-
nures, pl. 61.
cites S. C.

[2. If a man holds of the king as of his crown of the honour of Berkhamstead, this is a tenure in chief. 21 E. 3. 41. b.]

That in ward the prince counted that a man held of the king in chivalry as of his crown, of the honour of Berkhamstead by service of chivalry; and that the king had given the same honour to him and his heirs kings of England, &c. Brooke says, that so it seems that some honour may be held in capite. And yet see Magna Charta, that all honours are not in capite; for it is not properly in capite, but where he holds of the king as of his person, and not of the manor or honour. — S. C. cited Arg. Dav. Rep. 59. a. in the case of the county palatine of Wexford, that the prince shall not have the prerogative of capite tenure during the life of the king.

An honour is the most noble feignory of all others, and originally created by the king, but may afterwards be granted to others. Co. Litt. 108. a.

It is a te-
nure in ca-
pite, and by
knights
service; and
it may be
that in an-
cient time
he should

[3. [So] if a man holds of the king as of his honour of H. by the service of render of 10 s. ad Wardam Castri Dover, this was a tenure in capite. This appears by the writ of livery in the Register, 296. b. which see also in Fitz. Na. 225. E. and there 256. A. Fitz. observes upon the writ this to be a tenure in chief.]

guard the castle; and that now the king has taken the rent for the same, and yet the taking the rent does not alter the nature of the tenure. Quære. F. N. B. 256. (A)

A manor was held per redditum 8 s. 1 d. ad Wardam Castri de Dover, &c. Resolved that this is a socage tenure. Litt. Rep. 47. Trin. 3 Car. C. B. Stevens v. Holmes.

[4. In time of E. 2. a man held of the king in capite ut de honore Abbathie Mariae. This appears by the writ in Fitz. Na. 256. a.]

Some ho-
nours be in
capite, as
part of Pe-
verel, and of
others. Br.
Livery, pl.
58. cites 29
H. 8.

* It was
held ac-
cordingly.
Ley. 52.

[5. There are 4 honours, of which land being holden, they are tenures in capite, that is to say, they shall sue livery, and the king shall have the same prerogatives by them as by other tenures in chief of his person, and those are Bononia, Haggonett, * Peverell, and parcel of Dover, and the course of the Court of Wards is agreeing herewith for those at this day. Co. Litt. 77. for all except Dover. But there is mentioned also the honour of † Raylegh; but see 34 H. 8. f. 330. Brook cites 3 E. 3. Rot. 2. in the Exchequer, that this is not tenure in chief.]

Trin. 17 Jac. in the Court of Wards in CHURCHE'S CASE, for the manor of Wood Mortimer in Essex; and there said that this honour of Peverel (there called Penerel) was called and known by the several names of Hatfield Peverell, sometimes Peverel London, and sometimes the honour of Hatfield Peverel of London; but that all was in truth but one honour, and not diverse.

† It was found that a man held of the king in chivalry in capite, as of his honour of Raylegh; and it was taken to be no tenure in capite, but tenure of the honour; and therefore the heir shall have ouster le main of his other lands, which should not be if it had been in capite; for then the king should have all in ward by his prerogative. Br. Tenures, pl. 94. cites 3 E. 3. Rot. 2. in the Exchequer. And such another matter there 5 H. 6. Ro. 4. Ex parte rememb' thesaurarii; but otherwise it is, if the honour be annexed to the crown; for then the honour is in capite. And anno 17 H. 7. the honour of Raylegh was annexed to the crown, therefore now this is in capite. But where the king gives land to hold of him by fealty, and 2 d. pro annibus servitiis, this is socage in capite; for it is of the person of the king. Contra if it was to hold as of the manor of B. note the difference. Br. Tenures, pl. 94. cites 33 H. 8.

There is a
manifest
difference be-

[6. So a man may hold in capite as of the dutchy of Lancaster, which is a county palatine. Co. Litt. 77.]

† Fol: 104.

even the
case of the
principality of

[7. If a man holds of the king, as of his principality of Wales, by the ‡ service of going into the war of the prince at the charges of the prince, this is not any tenure in chief.; § D. 17, 18 El. 344. 3.]

principality of Wales, 17 El. 3. 45. a. and the case of the county palatine; for where before the

the subjection of Wales to the crown of England, a man held land of the prince of Wales by service to go in his war; this was not tenure of which the common law could take notice; for this principality of Wales was not governed by the common law, but was a dominion by itself, and had its proper laws and customs: and for this reason when this country was reduced under the subjection of the crown of England, such tenure as was of the prince of Wales, could not become a capite tenure of the king of England. But every county palatine, as well in Ireland as in England, was originally parcel of the same realm, and derived from the crown, and was always governed by the laws of England, and the lands there were held by services and tenures, of which the common law took notice, though the lord had a several jurisdiction and seigniorie separate from the crown; and therefore the tenure in capite of the county palatine, is of the same nature with the tenure in capite of the king, and so being come to the crown, shall be tenure in chief of the king, as it was before of the county palatine. And the reason of this difference appears fully in 19 H. 6. 12. Resolved per Cur. Dav. Rep. 67. a. Trin. 9 Jac. in the Exchequer, the case of the county palatine of Wexford.

§ D. 344. b. 345. Ap. David's case. — S. C. cited D. 359. b. Marg. pl. 3. and that it was only a mesne tenure — S. C. cited Arg. Dav. Rep. 59. b. in the case of the county palatine of Wexford. And says, see the statute of Magna Charta, cap. 32. and the book of 28 H. 6. 11. b. to this purpose.

[8. If the king grants land to hold of any of those ancient honours by knight service, and not in capite, this is a tenure as of the honour, and not a tenure in capite. Master Cholmley said that this was one CLARK's case, in the Court of Wards. 7 Car. so resolved per Curiam.]

* [215]

Ley's Rep. 7. Pasch. 7 Jac. [and not 7 Car.] seems to be S. C. and it was found

that the land was held of the honour of Peverel by knight service, and not in capite; and the doubt was, because it appears 29 H. 8. Br. Livery, 53. that but part of Peverel is in capite; whereupon the chief justices and chief baron assistants resolved that it was a mean tenure by knight service; for the express finding it not to be in capite, imports the land to be parcel of that part of the honour of Peverel which is no parcel of the old honour of Peverel; and it was decreed accordingly.

[9. If a man holds of a common person, as of an honour or manor by knight service, and this honour or manor comes to the king by † escheat, that is to say, attainder, &c. or by purchase, or the like, he shall hold of the king, as of the honour and manor as before, and shall not hold in chief. D. 30 H. 8. 44. 27. 1 El. 168. 18 D. Palatine, 63. Magna Charta, cap. 31. ‡ 29 H. 8. f. 113.]

It seems this is not tenure in chief commenced in ancient times upon the grants of the king to defend

their persons, and their crown and royalty against enemies and rebels. D. 44. pl. 28. Gilbert's case.

† Co. Litt. 108. a. S. P.

‡ Br. Tenures, pl. 61. cites 29 H. 8. S. C. — Br. Livery, pl. 57. cites S. C.

[10. If the king gives land to hold of him, as of an honour or manor, which is not any of the ancient honours, this is not a tenure in capite. D. 30 H. 8. f. 113.]

It is all one where the king gives land tenendum de nobis

ut de manerio, &c. in capite, and where the words are transposed, viz. de nobis in capite ut de manerio, &c. For when in the beginning or end it is expressly limited to be held ut de manerio, the tenure of the person is abundant. 12 Rep. 135. Estwick's case. — This was held as a mesne tenure, and not a tenure in capite. Ibid. 136. cites baron Luke's case.

[11. A tenure in capite ought to commence and take its original creation by the king himself, and not by any subject. D. 30 H. 8. 44. 29. [30.] for this tenure, which is created by a subject, cannot by any means after be a tenure in chief.]

[12. A tenure in capite is a tenure of the king as of his crown, that is, as he is king, and of his person. Co. Litt. 108.]

And not when it is holden of

the king, as of any honour, castle, manor, &c. Co. Litt. 108. a. — F. N. B. 5. (K) accordingly, and

and that because the writ of right, in such case of its being held of an honour, &c. shall be directed unto the bailiff of the honour or castle, or manor to do right. But when the lands are held of the king as of his crown, they are not held of any manor, castle, or honour, but merely of the king as king, and of the king's crown as of a feignory by itself in gross, and in chief above all other feignories.——D. 44. b. Mich. 30 H. 8. pl. 44. S. P. GILBERT's case; and that if writ of right be brought of lands held of the king in chief, the writ shall be directed to the sheriff.

S. P. Arg.
Dav. Rep.
59. a. in the
case of the
county pa-
latine of
Wexford.

[13. If a man holds of a common person in gross, as of his person, and this feignory escheats to the king (though it be by attainder of treason) he holdeth [of the] person of the king, yet he doth not hold in capite, because the original tenure was not created by the king. Co. Litt. 108.]

[216]
Br. Te-
nures, pl. 61.
cites 29 H.
8. S. C.—
S. C. cited
Arg. Dav.
Rep. 59. a.
in the case
of the coun-
ty palatine of Wexford.

[14. If the king purchases a manor, of which J. S. holds in chief; and after the king grants over the manor to J. D. excepting the services of J. S. Now J. S. holds of the king as of his person, yet he shall not hold in capite, that is to say, to subject him to the prerogative of the king of a capite tenure, but shall hold as he held before; for the act of the king shall not prejudice the tenant. 29 H. 8. f. 113.]

S. C. cited
Arg. Dav.
Rep. 59. a.
in the case
of the coun-
ty palatine
of Wexford.

[15. If the prince, before quia emptores terrarum, had created a tenure of his person, and after had been made king; yet this is not a tenure in capite, because in the creation it was not a tenure in capite. D. 30 H. 8. 44. 30. [31.]

Yet the
feignory is
gone, and
the mesnal-
ty is come
in lieu
thereof. Ibid.
—2 Le. 80.

[16. If the king, lord, mesne, and tenant are, and the mesne holds of the king in capite, and after the mesne dies without heir, or is attaint of felony, or dies, and the king is heir to him, or the king purchases the mesnalty, yet the tenant shall not hold in chief, because this tenure was not derived from the crown, but by a mesne. D. 30 H. 8. 44. 30. [31.]

pl. 169.
29 Eliz. in the Exchequer, the Bishop of London's case. The mesne held in chief, and the tenant by knight's service, and the manor escheated by attainder. The question was, if the tenancy should be holden in chief. Manwood said, it had been held, that no tenure in capite may be, unless by creation of the king.——2 Le. 214. pl. 347. Mich. 29 Eliz. S. C. in almost the same words.

[17. If the king at this day gives land in tail, to hold of him in capite, this tenure is a tenure in capite of the person of the king, and not incident to the reversion, nor shall pass by grant of the reversion. D. 30 H. 8. 44. 35. [36.]

He that
holds of the
king, must
hold of the
person of
the king,
and not of
any honor,
barony, ma-
nor, or
feignory;
and it ap-
pears farther

18. Magna Charta, cap. 31. If any man hold of any escheat, as of the honour of Wallingford, Nottingham, Boloin, or * of any other escheats which be in our hands, and are baronies, and die, his heir shall give none other relief, nor do no other service to us than he should to the baron, if it were in the baron's hand.

And we in the same wise shall hold it as the baron held it; neither shall we have, by occasion of any barony or escheat, any escheat or keeping of any of our men, unless he that held the barony or escheat otherwise held of us in chief.

in our books, that he that holds of the king in chief, must not only hold of the person of the king, but

the tenure must be created by the king, or some one of the progenitors, or predecessors, kings of this realm, to defend his person and crown, otherwise he shall have no prerogative by reason of it; for no prerogative can be annexed to a tenure created by a subject. Note, here is not named the honour of Lancaster, which was an ancient honour ever since the Conquest, which E. 3. raised to a county palatine, as in the 4 part of the Institutes, cap. Duch. of Lancaster, appears. 2 Inst. 64. cites 28 H. 6. 11. per tous les justices. 1 E. 6. Bro. Trav. 53. Stamford. Prerog. 29. b.

* This is *intended of common escheats*. Br. Livery, &c. pl. 58. cites 29 H. 8. — Lord Coke says, some question has been made of these words; for some have said, that these words are to be understood of common escheats, *as where the lord dies without heir, or where he is attainted of felony. But where the lord is attainted of high treason, there the king has the land by forfeiture of whomsoever the land is held, and not in respect of any escheat by reason of any feignory. And therefore where William Riparave, a Norman, held lands in fee of the king, as of the honour of Peverell, and Riparave forfeited his said land for treason, and the king seised it as his escheat of Normandy. In this case the land so forfeited was no part of the honour, as it should have been, if it had come to the king as a common escheat; for it comes to the king by reason of his person and crown, and therefore if he grant it over, &c. the patentee shall hold it of the king in chief, and not of the honour. And all this is to be agreed; but yet the tenants that held before of the honour by knights service, cannot hold of the king in chief. 1. For that they hold not of the person of the king, but of the honour. 2. Because the tenure was not created by the king, or any of his progenitors, as has been said. 2 Inst. 64, 65.*

And so does Bracton, who wrote soon after the statute, expound this great charter to extend to forfeiture of baronies for treason, as of the Normans. 2 Inst. 65.

And yet, to make an end of all ambiguities and questions, the statute of 1 Ed. 6. was made, which is, as the words be, a plain declaration and resolution of the common law. Likewise the statute of 1 E. 3. which provides, that where the land that is holden of the king, as of an honour, is aliened without licence, no man shall be thereby grieved, is also a declaration of the common law. 2 Inst. 65.

. By this chapter it appears, that a subject may have an honour. 2 Inst. 65.

† [217]

19. Complaint was made at the second parliament in anno 1 E. 3. as appears cap. 13. that *lands, held of the king as of honours*, were seised for fines for alienation, as well as if they had been held in capite, by which the king wills, that such seisures afterwards shall not be made. Brooke says, and so see that such tenure is not in capite. Br. Tenures, pl. 100.

20. In assise the plaint was of an office, viz. that he held the *usbery of the Exchequer, whereof the serjeanty of C. B. is parcel*, in chief of our lord the king. Br. Tenures, pl. 25. cites 8 Aff. 7. Brooke says, quod nota, an office held in capite.

21. It is admitted, that a man may hold *of the king in capite in socage as well as in chivalry*; and so is the law at this day clear. Br. Tenures, pl. 46. cites 47 E. 3. 26.

22. Note per Bromley, that it is held, that if [it be found that] a man *holds of the king of his duchy of Lancaster, per quæ servitia juratores ignorant*, it shall be taken as service of chivalry in capite as in other cases of the king; for duchy land given by the king passes from the king by livery of seisin, and shall be as it had been in manibus ducis. Br. Tenures, pl. 1. cites 26 H. 8. 9.

23. The king may create a tenure of him in chief, if he *reserves it to his person and as a service in gross*; but if he reserves the tenure as of his manor, honour, or castle, this clearly is no tenure in chief; for the services are regardant to the manor, honour, or castle, and not relating to the king's person. D. 44. pl. 29. Mich. 30 H. 8. Gilbert's case.

24. *Grand serjeanty* is tenure in chief; for such tenure is of none but the king. D. 44. b. pl. 30. Mich. 31 H. 8.

25. A tenure of the king as of his honour of Gloucester, whereof two parts came to the king by descent or purchase, and the third part by the attainder of the late duke of Buckingham, shall not be accounted a tenure in chief of the king, as of his person, nor shall give prerogative of other lands to the king. D. 58. pl. 6. Trin. 36 H. 8. says, it was so decreed in the case of the heir of ARTHUR DE CLOPTON, who was in ward to the king, by reason of the said tenure by service of chivalry ut de honore, as above.

This branch has been well expounded, for if the first office find a tenure of king, per quæ servitia, 26. 2 E. 6. cap. 8. enacts, that where an office is found by these words, or the like, *Quod de quo vel de quibus tenementa prædicta tenentur, juratores præd' ignorant, or find them holden of the king, but per quæ servitia ignorant, &c.* it shall not be taken for an immediate tenure of the king in chief, but in such cases melius inquirendum to be awarded, as has been accustomed of old time,

&c. yet if, upon the melius inquirendum, the tenure be found of a subject, the first office has lost his force per sensum hujus statuti, and need not be traversed; and the melius, &c. is in nature of the diem clausit extremum, or mandamus, &c. And this was but a declaration of the ancient common law, as by the words of the statute (as has been accustomed of old) it appears; but if, upon the melius, it be found again as uncertainly as before is said, then it is in judgment of law a tenure in capite; and so it was before the making of this act, and so are the books that speak hereof, to be intended. But if, upon the melius, a tenure be found of the king ut de manerio per quæ servitia, &c. it shall be taken for knight service. Co. Litt. 77. b.

Co. Litt. 27. Of ancient time every earldom and barony were holden 83. b S. P. of the king in capite. 2 Inst. 7.

says, it was so at and before the statute of Magna Charta, cap. 20. and that the king would not suffer them to be divided or severed; but that at this day earls and barons are without such earldoms and baronies of the king in chief.

[218] 28. The queen made a feoffment of lands of the duchy out of the county palatine to hold of her in capite; the feoffee shall hold of her in capite as of her crown of England. Per Egerton Solicitor Gen. Arg. 2 Le. 151. pl. 184. in case of the lord Howard v. the town of Waldon. Cites 4 Eliz. Pl. C. 223. at the end of the duchy case.

29. A man seised of land held in capite of the king before the statute of quia emptores terrarum enfeoffed one J. S. of part of the demesnes in fee, without saying any thing more. The feoffee enfeoffed another to hold of the feoffor and his heirs by the rent of 1 l. 6 s. 8 d. a year pro omnibus servitiis & demandis. This land clearly is not held in capite, and the first mesnalty is held of the feoffor, as of the manor by service of chivalry. D. 299. b. pl. 33. Pasch. 13 Eliz. Ancn.

4 Le. pl. 80. pl. 169. S. C. in almost the same words. 30. If before the statute of Westminster 3. the king's tenant in capite had made a feoffment to hold of him, so as now there is lord, mesne, and tenant, and afterwards the mesnalty came to the crown by attainder, &c. If by the coming of the mesnalty to the crown, the feignior paramount be extinct, then the tenancy is not holden in capite; but if the mesnalty be drowned in the feignior it is otherwise. Some held that there was a difference where the mesnalty comes to the feignior, and where the feignior comes

comes to the mesnalty; by Manwood Ch. Baron. 4 Le. 314. pl. 347. Mich. 29 Eliz. in the Exchequer. The bishop of London's case.—But there is added a quære.

31. Certain lands called S. were holden of the manor of P. by rent and suit of court; P. was holden of the manor of G. by rent and suit of court; the manor of G. came to the crown by the Statute of dissolutions; the king H. 8. granted the manor of G. to J. S. and his heirs, to hold by knight service in capite: B. purchased the manor of G. and afterwards he purchased the moiety of the manor of P. and the lands called S. Afterwards B. died, and the lands purchased by him descended to his son, who purchased the other moiety of P. and afterwards enfeoffed C. of the lands called S. It was resolved in this case, that the lands called S. were held in capite by one intire knights fee. Mo. 729. pl. 1015. Pasch. 38 Eliz. Resolved by Popham and Anderson Ch. J. Creswell's case.

32. It was found upon a diem clausit, &c. that J. S. held Bl. Acre of A. and also Wh. Acre of Q. Eliz. as of her manor of V. by fealty and 3 s. rent, but per quæ alia servitia ignorant. Upon a melius inquirendum, it was found, that J. S. held Wh. Acre of the late queen by knight service. Hobart Ch. J. and Tanfield Ch. B. resolved, that Wh. Acre upon both the inquisitions should not be construed to be held of the late queen by knight service in capite, but only by knight service, as of a mesne tenure, as of her manor of V. and decreed accordingly. Ley, 50, 51. Trin. 13 Jac. French's case.

33. It was found by inquisition, that J. S. died seised of certain land, et quod tenentur de domino rege ut de uno grosso, per vigesimam partem unius feodi militis. This was ruled by Hobart Ch. J. and the Ch. Baron, absente the Ch. Justice, to be a tenure by knight service in chief. All tenures in chief are in gross, and the words (ut de uno grosso) are scarce of any sense, but of no certain sense at all in law, and so stand as void. Hob. 90. pl. 123. Hill. 13 Jac. Spathurst's case.

Jenk. 298. Pl. 57. a tenure of the king per servitium militare in gross is a tenure in gross.—An office found, quod

tenet de domina regina per servitium militare, generally, and Brooke, Saunders, Griffin Attorney, Stamford and Dyer, thought it ought to be traversed, in as much as it shall be intended the best for the queen, viz. a tenure in chief. D. 161. b. 162. pl. 47. Anon.

(M) In what Cases the Law will create a Tenure in [219] Capite without Reservation. Of whom.

[1.] If the king grants land without expressing any service, this is in capite. 29 H. 8. f. 113.]

[2. If the king grants land to hold of his person, this is in capite.]

[3. So if he grants to hold of him, this is of his person, and so in capite. 29 H. 8. 113. Da. 1. 66. b.]

Fol. 505.

Br. Livery, pl. 57. S. C.—S. C. cited Arg. Dav. Rep. 66. b. in the case of the county palatine

tine of Wexford.——If the king enfeoff others to hold of him, they shall hold as of his crown in chief, per Finchden. Br. Tenures, pl. 9. cites 47 E. 3. 21.

See (L)
pl. 1.

[4. If a count *palatine* (who has power to create tenures in capite of himself, by grant of *jura regalia*) grants land to hold of his person, this is not a tenure in capite; for though he has such power, yet his person is not changed. Contra Davies, 1. County Palatine, 66. the principal matter.]

[5. If the king purchases land which is held of another, all the feignories by this are extinct, and if the king grants it to another to hold of him, he shall hold as of his crown in chief. 47 E. 3. 21. b.]

Br. Te-
nures, pl. 9.
cites S. C.
per Finch-
den. Quod
nullus de-
dixit.

[6. When an honour is seised into the hands of the king, if a manor held of the honour falls to him by escheat, as of a common escheat, if he aliens to hold of him, he [the alienee] shall hold by the same services as it was held before of the honour. 47 E. 3. 21. b.]

Br. Te-
nures, pl. 2.
cites S. C.

[7. But when an honour is seised into the hands of the king, and a manor comes to the king by forfeiture of war as his escheat of Normandy and others, which is by reason of his own person, and he is seised and enfeoffs another, he shall hold of him in chief. 47 E. 3. 21. b.]

See (O).

(N) Tenure by Knights Service. *What Estate may be held by Knight Service.*

[1. **A** Man may lease land for life to hold by knight service. 25 E. 3. 47. admitted, (and it seems that the lessee shall do the service of a knight,) but his heir shall not be in ward.]

2. Lands in *gavelkind* are held in socage and not in chivalry. Br. Tenures, pl. 72. cites 9 H. 3. and Fitzh. Prescription, 63.

3. If, before the statute of *quia emptores terrarum*, a man being seised of one acre of land, leases the same to a stranger for life; and afterwards grants the reversion in fee unto another stranger, to hold of him and his heirs by knights-service, this is a good tenure; but the grantor shall not distrain for the services, during the life of the lessee, &c. Perk. f. 658.

4. If before the statute of *quia emptores terrarum*, a man seised of one acre of land leases for life, and afterwards releases all his right therein to the lessee, to have and to hold unto him, and his heirs, &c. or confirms the estate of the lessee, to have and hold the same to him and his heirs, to hold of him by knights-service; the releasor may distrain for such services, or any of them in the land whereof the lease, release, or confirmation was made, as often as the same shall be behind, &c. Perk. f. 659.

[220]

(O) Knights Service. * *Castle-Guard.* How it is to be done.

* Castle-guard is a service due to the king only. Which is originally true, because no man can erect a castle or fort in the kingdom without the king's licence. But in case the

[1. **M**agna Charta, cap. 20. *Nullus † constabularius distringat aliquem militem ad dandum denarium pro custodia castri si ipse eam facere voluerit in propria persona sua, vel per alium probum hominem faciat, si ipse eam facere non possit propter rationabilem causam. Et [si] nos adduxerimus vel miserimus eum in exercitum, sit quietus de custodia castri secundum quantitatem temporis quo per nos fuerit in exercitu de feodo pro quo fecit servitium militare in exercitu.*]

king grants a castle, with all the liberties belonging to it, unto a subject, he grants castle-guard also, if there be any such service due unto it; and for this reason this service may as well belong to a subject as the right of a forest. It is a service consisting in fortifying and defending any castle of the king's, or another lord's, as often as the feodary shall require. And this is properly knights-service, when it requires the person of the tenant; but when it is converted into a certain pecuniary mulct, payable every year for the fortifying and guarding of a castle, it is altered from the nature of knights-service. Cowell's Institutes, 2 lib. tit. 3. f. 4.

† Constabularius is taken here for castellanus. See 2 Inst. 33. cap. 19. 34. cap. 20—— This act (consisting upon 2 branches) is declaratory of the common law. The 1st, that he, that held by castle-guard, viz. to keep a tower, or a gate, or such like, of a castle in time of war, might do it either by himself, or by any other sufficient person for him, and in his place. And some hold by such service, as cannot do it in person, as mayor and commonalty, dean and chapter, bishops, abbots, &c. Infants being purchasers, women, and the like, and therefore they might make a deputy by order of the common law. If 2 jointenants hold by such service, if one of them perform, it is sufficient.

2dly, If such a tenant be by the king led, or sent to his host, in time of war, the tenant is excused and quit of his service for keeping of the castle, either by himself, or by another, during the time that he so serves the king in his host; for that when the king commands his service in his host, he dispenses with his service, by reason of his tenure, for that one man cannot serve in person in 2 places; and when he serves the king in person in one place, he is not bound to find a deputy in the other; for he is not bound to make a deputy, but at his pleasure; and this is also declaratory of the ancient common law. 2 Inst. 34. cites Co. Litt. 111. 121.

2. They which hold by castle-guard, viz. to guard a tower of their lord's castle, or a door, or a bridge, or a sconce, or some other certain part of the castle, upon reasonable warning given by the lord, or some other for him, that † enemies will or are come into England, hold by knight-service, and yet they hold not by escuage, nor shall pay escuage. Litt. f. 111. & Co. Litt. 82. b. 83.

† Though Littleton speaks of enemies, yet it seems that to keep a castle, in time of insurrection and rebel-

lion, (though, in propriety of speech, rebels are no enemies,) is a tenure by knight-service. Co. Litt. 83. a. ——— If the castle be wholly ruined, yet the tenure remains by knights-service; and it goes in benefit of the tenant, as to the guarding of the castle, until it be rebuilt. Co. Litt. 83. a.

3. By the ancient custom none but a knight might be charged with the guard of a castle belonging to the king; for the letter of this law mentions only such; and therefore to hold by castle-guard is a tenure in knights-service. And it seems, that rent for castle-guard originally was consistent with knights-service, and that it was not annual, but promiscuously knights might either perform the service, or pay rent in lieu thereof; and upon occasion did neither, if the king sent them into the field. And lastly, that a knight might either do the service in

in his own person, or by his esquire, or another appointed by him thereto. Bacon of government, 267.

See (F. a) (P) Tenure by * Knights-Service, What. [And what Writ lay of it.]
pl. 17.

* It is commonly called in our books *servitium militare*, &c. or *servitium militis*. And this service

[1. † *DRENGAGIUM* est certum servitium, but not knight-service. P. 6 E. 1. B. R. Rot. 7. adjudged against Robert de Infula, per 8 justiciarios præcipuos & plurimos alios de concilio regis.]

was created and provided for the defence of the realm, to perform which service the heirs are not accounted in law able, till the age of 21 years. Therefore, during their minority, the lord shall have custody of them; not for benefit only, but that the lord might see, that they be in their young years taught the deeds of chivalry, and other virtuous and worthy sciences. Co. Litt. 75. b.

There was no certain sort of profit arose by lands held by knight's service; for they were not for the king's provision, but his defence. These were to attend the king in arms, according to the array that was made in every expedition; and whosoever failed in coming, or rendering his quota of men according to his tenure, his lands were originally liable to be seized into the king's hands for not doing his duty. Gilb. Hist. View of the Exch. 21. cap. 2.

† See Spelm. Gloss. verbo *Drenches*, *Drengus*, *Drengagium*, which words he says gave him great perplexity a long time.

S. P. Br. [2. A foreign service is knight-service. 7 H. 4. 19. b.]
Tenure, pl.

12. cites S. C. But Brooke says, he wonders that foreign service is service of chivalry, unless the next lord holds by *servitium militare* of his next lord.

It is called *servitium forinsecum*, quia pertinet ad dominum regem & non ad capitalem dominum nisi cum in propria persona profectus fuerit in servitio, & nisi cum pro servitio suo satisfecerit domino regi, &c. ideo forinsecum dici potest, quia fit & capitur foris sive extra servitium, quod fit domino capitali. Co. Litt. 69. b. cites Bract. lib. 2. 36. — S. P. And it is also called *regale servitium*, quia specialiter pertinet ad dominum regem. Ut si dicata in carta, faciendo inde forinsecum servitium, vel regale servitium, vel servitium domini regis, quod idem est, &c. And another says; Et sunt quedam servitia forinseca quæ dici poterunt regalia quæ ad scutum præstantur, & inde habemus scutagium, & ratione scuti pro feodo militari reputatur, &c. So as in respect of him that does it, it is called *servitium militis*; but in respect of him for and to whom it is done, viz. to the king, and for the realm, it is called *servitium regale*, or *servitium domini regis*, &c. Co. Litt. 74. b. 75. a.

[3. A fine was levied of a knight's fee. 5 E. 3. 213. 16 E. 3. Brief, 655.]

[4. 11 H. 3. among the rolls in the Tower of London Rot. 13. *Wilhelmus de Gerdelleg petit versus G. Man extraneum, feodum unius militis cum pertinentiis in S.* The defendant pleaded recovery of the advowson, which once appertained to the said land, &c. which the demandant acknowledged. And therefore, because demandant *petit* † *dimidium feodum cum pertinentiis*, nulla facta exceptione de advocacy illa, consideratum est quod defendens non respondeat ad hoc breve, & ipse sine die, &c. and the plaintiffs in misericordia.]

† Fol. 506.

[5. Vide Dower, 161. 196. 165. adjudged that writ of dower lies of a knight's fee.]

[6. P. 12 E. 2. Brief, 184. by Berr. In ancient times, at the ancient law, a man should have *præcipe quod reddat* of a knight's fee.]

[7. 3 E.

[7. 3 E. 1. B. Rot. 10. *A. queritur de B. quod cum ipse teneat de ipso 2 carucatas terre in Conington, per homagium, & per servitium militare unde 12 carucata terre faciunt unum feodum militis pro omni servitio.* And H. 5 E. 1. B. Rot. 2. unde 22 virgate terre faciunt feodum militis. Vide my manuscript register bound with magna charta, fol. 2. There is a writ quod clamat tenere de se per servitium unde tot carucata terre, vel tot hide terre, vel tot bovata terre, vel tot virgate terre, faciunt feodum unius militis. And see the printed register, fol. 2. *que solebat esse such writ.*]

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[8. Tr. 1 E. 2. B. R. Rot. 59. Lincoln, it is said in pleading, quod 48 carucata terre faciunt feodum unius militis.]

Ld. Coke says there is great diversity of opi-

nions concerning the contents of a knight's fee, viz. how much land goes to the livelihood of a knight. See Co. Litt. 69. a. where he treats largely of this matter.

[9. A knight's fee is not accounted according to the quantity or value of the land, but according to the ancient feoffment and reservation; for of the same land in quantity or value may be reserved one or two, or more or less, knight's fees. Vide 14 E. 2. Liber parliamentorum, fol. 91. Contra Co. 9. Lowe, 124.]

[10. See the summons to be made of knights is always, *quod omnes qui habent 20 libratas terre, vel feodum unius militis integrum valens 20 l. per annum, &c.* by which it appears that there may be a knight's fee, which is not of the value of 20 l. a year.]

Brady's Hist of England, 620. in the reign of H. 3. says, that all the sheriffs of Eng-

land were amerced each 5 marks, because they did not distrain every one that had 10 l. a year in their several counties, to come to the king and be knighted; but they obtained respite of the king, according to his writs to them directed.

[11. In the treasury with Master Bradshaw in the bag of tenures there is a roll, whereof the title is *de feodis militum & partibus feodorum, unde Johanna de Bohun comitissa Hereford dotata fuit 5 Junii 48 E. 3.* In which roll every fee, and the value thereof, is set down whereof she was endowed, where it appears that a man holds sometimes by two fees land of the value of 10 l. and sometimes of the value of 15 l. and sometimes more and sometimes less, and oftentimes by a fee land of the value of 5 l. and this is for the most part, and according to this rate, and rarely by more, but no certainty according to the value.]

[12. *Talis tenet dimidium feodum militis vocatum Bacons in London de hereditate Mountfichit qui tenet ulterius de rege,* this shall be intended the service of a moiety of a knight's fee, if no other tenure be expressly made and found. D. 16 El. 329. f. 15.]

[13. *Si dicatur in charta faciendo inde * forinsecum servitium, vel regale servitium sive servitium domini regis, quod idem est secundum modum feoffationis, scilicet, quantum pertinet ad feodum unius militis, vel duorum in eadem villa, vel de eodem feodo, vel ad scutagium 100 s. 2 marcas, vel 3, &c.* Sed si dicatur reddendo inde per annum tantum, & faciendo tales sectas pro omni servitio, excepto regali servitio, vel salvo forinseco, tunc videndum erit an primis si feodum illud in ipsa donatione forinsecum debuit ab initio vel non,

Braet. lib. 2. cap. 16. f. 7. pag. 36. a. — * Forinsecum servitium is such service by which the donor held

the same
land which
he gave, &c.
Perk. f.

650.— Ser-
vitia dici
possunt fo-
rinfeca,
quia perti-
nent ad do-

Fol. 507.

non, si autem nullum debuit ab initio, nec sit certum forinfecum in charta expressum, numquam prestabitur nec peti poterit propter incertitudinem. Bracton, lib. fol. 36. Co. Litt. 75.]

[14. A man may give land to hold by less service than he himself holds, *ut si ipse teneatur ad forinfecum domino & feoffatori suo tenens ipse poterit alium inde ulterius feoffare sine forinfeco.* Bracton, lib. 2. fol. 21. b. [cap. 7. f. 3.]

[15. Bracton, lib. [2.] fol. 77. b. *Servitium forinfecum, quod dicitur regale, & quod pertinet ad scutum & militiam ad patrie defensionem.* [cap. 35. f. 1.]

minum re-

gem, & non ad dominum capitalem, nisi cum in propria persona profectus fuerit in servitio, vel nisi cum pro servitio suo satisfecerit domino regi quocunque modo & sunt in certis temporibus, cum casus & necessitas evenerit, & varia habent nomina, & diversa. Quandoque enim nominantur forinfeca, large sumpto vocabulo quoad servitium domini regis, quandoque scutagium, quandoque servitium domini regis, & ideo forinfecum dici potest, quia sit & capitur foris, sive extra servitium, quia sit domino capitali: Item scutagium, quia talis prestatio pertinet ad scutum quod assumitur ad servitium militare. Bract. 36. lib. 2. cap. 16. f. 7.

[223]

If there be
lord and
tenant by
knights ser-
vice, and

[16. Hill. 8 E. 1. Rot. 64. b. *Distringas pro homagio & relevio, & pro servitio forinfeco quantum pertinet ad unum feodum militis.*]

the tenant gives the tenancy in tail faciendo forinfecum servitium quantum ad eundem terram pertinet, by the words the donee shall hold of the donor by knights service, &c. Jenk. f. 634.

[17. Time of E. 2. 88. b. there is pleaded a gift in fee of land, *tenendum libere pro homagio & servitio, & per forinfecum servitium, scilicet, ad scutagium 20 s. quando venit duos solidos & unum quadrantem & ad plus, &c.*]

He that
holds by
cornage
holds by

[18. 31 E. 1. Rot. Finium, M. 9. *Per forinfecum servitium cornagii, he was in ward.*]

knight service. Co. Litt. 69. b. Litt. f. 156. is, that it is said that in the marches of Scotland some held of the king by cornage, that is to say, to wind a horn, to give men of the country warning when they hear that the Scots, or other enemies, are come, or will enter into England, which service is grand serjeanty. But if any tenant hold of any other lord than of the king by such service of cornage, this is not grand serjeanty, but it is knight service.

* See Co.
Litt. 68. 74.
b. 75. a.

[19. The *statute* 1 E. 2. [f. 3.] is, that he who holds lands in socage of other manors than of the manors of the king doing no foreign service, the rolls of the Chancery shall be searched, and it shall be done as before. By which the statute implies that he is not compellable to be a knight. And by * *foreign service is intended, as it seems, knight service.*]

(Q) pl. 14.

[20. *Capitula escaetrie in Magna Charta, fol. 163. Item si religiosi vel ecclesiastica persona a conquestu Anglie aliquas terras seu aliqua tenementa de servitio militari, vel aliquo alio servitio in defensionem regni onerata acquisierunt, quis remanet oneratus de illis servitiis forinfecis & de cujuscunque feodo sunt, &c.*]

See (G) pl.
3.

[21. If a man gives land in tail, rendering rent & faciendo forinfecum servitium, in this case he shall have both, because all is one service. Kelloway incerti temporis 123. by Keble.]

[22. In the book of the ancient charters of the county of Cornwall, there is in 31 charter a feoffment of land rendering 12 d. rent for all exactions, *salvo servitio domini regis forinfeco quantum pertinet ad quinque acras libera terra de feodo suo*. And there in the 46th charter, the prior of Bodmin gave to Richard earl of Cornwall 3 acres, *faciendo de eisdem tribus acris Ingeramo de Bray, & heredibus suis regale servitium quantum pertinet ad predictas tres acras*. And there in the 169th charter, John de Gatesden gave the manor of Lerkey to the earl of Cornwall, *reddendo annuatim 2 calcaria deaurata, * salvo etiam sibi & heredibus suis servitio forinfeco debito & consueto pro omni servitio*.]

* If there be lord and tenant by knight service, and the tenant does give the tenancy in tail to hold of him by J. D. for all services salvo forinfeco servitio, in this case this salvo shall make

the donee to hold of the donor by knights service, and yet the same was not in the donor before, but the donor was chargeable with knights service for the same land unto him of whom he held it. Perk. f. 650.

23. Some held by custom to pay but the moiety, or the 4th part of the sum at which escuage was assessed by parliament; and because the escuage which they should pay was uncertain, they held by knights service. Hawk. Co. Litt. 116.

Litt. f. 98.

24. Tenure by cornage, if it be of any other lord than the king, is knight service. 2 Inst. 9. cites Litt. f. 156.

25. Every tenure by escuage is a tenure by knights service; but every tenant that holds by knights service holds not by escuage. Co. Litt. 69. a.

26. Sir Rich. Rokley Knight did hold lands at Seaton by serjeanty to be *vantrarius regis*, that is to be the king's forefootman when the king went to Gascoigne, donec perusus fuit pari solcarum precii 4 d. that is, until he had worn out a pair of shoes of the price of 4 d. And this service being admitted to be performed when the king went to Gascoigne to make war, is knight service. Co. Litt. 69. b.

[224]

(Q) Tenure by † Escuage.

[1. ESCUAGE was due, if the king had gone a voyage royal into Wales. Fitzh. Na. 83. c. 5 E. 1. Rot. Scutagii.]

[And 6 E. 1. Rot. Clausarum Membrana, 2. 20 E. 1. Liber Parliamentorum, 2 E. 1. Rot. Clausarum Membrana, 4. it appears by an inspeximus, that there was an escuage roll in 41 H. 3. upon a voyage royal to Wales. 7 E. 1. Clausarum Membrana, 9. a writ is directed to the treasurer and barons of the Exchequer to cause escuage to be levied in all counties, and there in the end it is *secundum quod hujusmodi scutagium pro aliis exercitibus Wallie in casu consimili levare consuevit*. 10 E. 1. Rot. Marecalli, the names of those who did their services and that paid their fines. 14 E. 2. Liber Parliamentorum, the king demanded escuage of the years of the 5, 10, 20, 31, 34 E. 1. and 4 E. 2. for the wars of Wales and Scotland. 8 E. 2. Rot. Finium Memb. 10. Commission to levy

† Escuage, in Latin scutagium, was a species of knight service. Some held by the service of a whole knight's fee, some by the service of half a knight's fee; and when the king made a voyage royal into Scotland to subdue the Scots, he that held by

knight's
fee ought
to be with

levy escuage for the years of the 28, 34, & 31 E. 1. Rot. Scutagii de 1. Usque 12 E. 2. for the escuage of the 34 E. 1.]

the king 40 days well arrayed for the war; he that held by half a knight's fee ought to be with him 20; and those that held by more or less, ought to be with him more days, or fewer, in the same proportion. And one might hold to serve the king in his wars in other countries, as well as Scotland. Hawk. Co. Litt. 111, 112. — S. P. Cowel's Institutes, 2 lib. tit. 3. f. 5.

When such as held by knight service failed on any expedition, in coming or rendering his quota of men, according to his tenure, the punishment originally was to seize his lands; but afterwards this seizure was changed into an escuage, or a fine, according to the degree of failure; but if they sent instead of personally appearing, they made a composition with the king for not attending in person, but sending others; if he did not come at all, then he was assessed for all the lands he held, but had no escuage from his tenants; but if he came, and there was a deficiency in any of his tenants, he had escuage from his tenants: this was an inducement for every person to come or send, because he had no escuage at all, unless he were there, or sent; so that all the escuage fell on him, and he had no aid over. Gilb. Hist. View of the Exch. 21, 22.

If the te-
nure be to
go in Gal-
liam, Hiber-
niam, Vasco-
niam, Pictaviam, &c.

[2. Escuage was due if the king had gone a *voyage royal* into Scotland. Ancient Tenures, fol. 1. b. because Scotland is of right appendant to the realm of England.]

it is all one as the going into Scotland. Co. Litt. 69. b.

[3. 31 E. 1. Rot. Scutagii. There is an escuage grant entered in the court rolls of the heirs of the earl of Devon, there are 2 rolls of accounts made 9 E. 2. one of the fees of the honour of Ockhampton, and the other of Plympton for the escuages received of the tenants of the said honours pro exercitibus regis in Scotia de annis 28 & 31 E. 1.]

So 9 R. 2.
the king
at the peti-
tion of the
commons
pardoned the
payment of
escuage for
his voyage
into Scotland.

[4. R. Edward 3. made one or more royal voyages into Scotland, yet no escuage was paid; but it seems this was because aids were granted to him for this purpose by parliament; but see the pardon of 50 E. 3. where forfeits, reliefs and * escuages made, fallen or chanced within the realm of England, are pardoned.]

Prynne's Cot. Rec. Abr. No. 40. — Co. Litt. 72. b.

* [225]

[5. So the pardon of 14 E. 3. cap. 3. Reliefs and escuages till the king shall go into Brabant [were] pardoned; but see the escuage roll of the county of Lincoln, where an escuage is levied for the voyage of the king to Scotland, the year 1 E. 3. which roll is in the Exchequer with Master Bradshaw.]

[6. He who holds by escuage ought to go with the king in a *voyage royal upon a rebellion*, not [where it] was to conquer that which the king had not before 5 E. 1. Rot. Clauso Membrana, 8. the clause is so expressed, scilicet, to suppress Elwin the prince of Wales and other rebels; and so 5 E. 1. Rot. Scutagii, Memb. 7.]

[7. An escuage was levied for the voyage of the king into Scotland, 4 E. 2. as appears by 13 E. 2. Rot. Finium M. 1. Ibidem 16 E. 2. M. 3.]

[8. 28 H. 3. Escuage was granted to the king, scilicet, 3 marks for every knight's fee upon the return of the king out of Britain, where he was to suppress the rebels and the French. Speed, 526.]

Lo. No

[9. No escuage is due for a voyage to *Flanders*. 25 E. 1. in the History of the Monk of Gisburne; this is contained in a petition to the king by the commons.]

[10. Escuage is properly to *sustain war between those of Wales and Scotland*, and not between other lands, because those shall be of right appendant to the realm of England. Ancient Tenures, fol. 1. b.]

[11. It seems that escuage is due *upon every voyage-royal* made in the realm for defence of the realm.] A voyage-royal is not only when the king himself goes to war, as Littleton says, but also when his lieutenant, or deputy of his lieutenant. And what shall be said a voyage-royal shall be adjudged in this case by the judges of the common law, as an incident to escuage, and not by the constable and marshal, or any other; & sic de similibus. Co. Litt. 69. b.

There is also another kind of voyage-royal, viz. *when one goes with the king's daughter beyond sea to be married, &c.* For such a voyage is for the good of the whole realm (for more profit for the realm cannot be, than to make alliance with another nation); but of this voyage-royal Littleton speaks not here, but only of the voyage-royal to war; so as there is a voyage-royal of war, and a voyage-royal of peace and amity. Co. Litt. 69. b.

* S. P. Co. Litt. 130. b. and that in such case a protection *profecturæ* may be purchased, and cast *pendente placito*.

[12. *Statutum de religiosis*, 7 E. 1. in magna charta, fol. 79. b. in fine statuti, nos statim per annum completum a tempore quo hujusmodi emptiones, &c. Terras & tenementa hujusmodi capiemus in manum nostram aut alios inde fefabimus per certa servitia nobis inde ad defensionem nostri facienda, salvis capitalibus dominis feodorum illorum wardis releviis & escaetis & aliis ad ipsos pertinentibus & servitiis inde debitis & consuetis.]

[13. Mirror of Justices, fol. 2. b. cap. 1. f. 3. of the remnant of the land they should enfeof the earls, barons, knights, sergeants, and others, to hold of the kings by the services provided and ordained for defence of the realm.]

[14. *Capitula escaetrie in magna charta*, fol. 163. Item si religiosi vel ecclesiasticæ personæ a conquestu Angliæ aliquas terras seu aliqua tenementa de servitio militari, vel aliquo alio servitio in defensionem regni onerata acquisierunt, quis remanet oneratus in illis servitiis forinsecis & de cujuscunque feodo sint, &c.] See (P) pl. 20.

15. Tenant for life may do escuage; for it seems that *escuage does not draw to it homage, but where the tenant has estate of inheritance*; for tenant for life cannot do homage. Br. Tenure, pl. 68. cites 19 E. 3. Fitz. Fine, 71.

16. He that holds by *homage, fealty, and escuage*, holds by so- [226] cage and not by chivalry. Br. Tenures, pl. 85. cites 13 H. 4. and Fitzh. tit. Avowry, 197.

17. *Homage and knight-service are incident to escuage*, and by the grant of services, escuage passes with the rest. Co. Litt. 69. a.

18. Escuage is *directed by custom*. Co. Litt. 72. b.; for Litt. f. 98. says, that some hold by such custom, that if escuage be assessed by parliament to any sum, that they shall pay only the moiety of the sum, and some only the 4th part of that sum.

Fol. 509.

* He that holds by castle-guard or cornage holds by knights service, and yet he shall pay no escuage, because he holds not to

(R) Escuage. * *Of what Service it is due.* Escuage is *not* due for any Service of † *Grand Serjeanty.*

[1. **T**HE constable of England ought by his office to go with the king in a voyage-royal, or otherwise he shall pay escuage. (And yet this is grand serjeanty.) 5 E. 1. Rot. Scutagii Memb. 6. admitted. For there it is entered that he is acquitted because he goes in person; and 10 E. 1. Rot. Marecalli Memb. 5. he sent another.]

go with the king to war. Co. Litt. 69. b.

† Tenure of the king by serjeanty to find a man for the war *ubicunque infra quatuor maria* is grand serjeanty; per Hanke. for it is service to be done by the body of a man, and if he cannot find a man to do the service he shall do it himself; quod aliqui iusticiarii concesserunt. Br. Tenure, pl. 13. cites xi H. 4. 72.

[2. So the marshal of England ought by his office to go in the voyage-royal, or otherwise he shall pay escuage. (And yet this is grand serjeanty.) 5 E. 1. Rot. Scutagii Memb. 6. admitted, and 10 E. 1. Rot. Marecalli Memb. 6.]

[3. 10 E. 1. Rot. Marecalli Memb. 4. dimidium serjeantie & facit per J. S.]

[4. 5 E. 1. Rot. Scutagii Memb. 7. All the bishops and abbots, *finem fecerunt*, or *pro quo satisfecerunt*, and 10 E. 1. Rot. Marecalli Memb. 6. Some abbots and bishops are excused for vacancy at the time; by which it appears that escuage is due from bishops and abbots, and they hold their baronies by grand serjeanty.]

5. The king shall not have escuage of such as hold by grand serjeanty, *unless they hold of him by escuage.* Litt. f. 158.

(S) To be assessed by Parliament.

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Magna Charta, cap.

[1. **K**ING John in a charter ordained in this manner.]

37. was, that escuage should be taken as it was in the time of H. 2. But Bacon of Government, 276, 277. says, that the charter of King John hath superadded hereunto this ensuing provision, viz. there shall be no escuage set in the kingdom, except for the redeeming of the king's person, making of his eldest son a knight, and one marriage of his eldest daughter; and for this there shall be only reasonable aid: and in like manner * shall the aids of the city of London be set. And for the assessing of escuage we will summon the archbishops, bishops, abbots, earls, and greater barons of the kingdom specially by our several writs, and will cause to be summoned in general by our sheriffs, and bailiffs, all other our tenants in capite, to be at a certain day after 40 days at the least, and at a certain place; and we will set down the cause in all our writs; and the matter at the day appointed shall proceed according to the counsel of those that shall be present, although all that were summoned do not come. And we will not allow any man to take aid of his freemen, unless for redemption of his body, and making his eldest son a knight, and one marriage for his eldest daughter; and this shall be a reasonable aid only. — This is copied out in Gilb. Hist. View of the Exch. 12. with a note and some few additions by way of explanation, in parentheses; but as it is mentioned as an *ADDITUM*, it may deserve the less notice as being an addition by some other hand, and the introductory note perhaps not easily to be supported.

[2. 13 E.

[2. 13 E. 2. Rot. Finium M. 1. Two marks de scuto given for the escuage of 4 E. 2. Ibidem, M. 2. 40s. de scuto de tempore E. 1.]

3. 'Albeit escuage uncertain be due by tenure, yet because the assessment thereof concerned so many, and so great a number of the subjects of the realm, it could not be assessed by the king, or any other but by parliament. And this was by the common law. No escuage was assessed by parliament since the reign of Ed. 2. and in the 8th year of his reign, escuage was assessed. Co. Litt. 72. a. b.

(T) Escuage. By whom the Service is to be done.

[1. **F**EMES and abbesses do the services always by others: Litt. f. 96. S. P. and so of other persons of religion. — And Lord Coke in his Comment, pag. 70. b. says, that the word (religion) is taken largely, viz. not only for regular or dead persons, abbots, monks, &c. but for secular persons also, as bishops, parsons, vicars, &c. for neither are bound to go in proper person.]

[2. It seems by all the escuage and marshalsea rolls, that all lay persons for the most part in good health, ought to do the service in proper person, and not by another.] Co. Litt. 70. b. thinks an idiot, madman, leper, a man maimed, blind, deaf, of decrepit age, &c. are not bound to go in proper person.

[3. 10 E. 1. Rot. Marescalli Memb. 5. *Infirmus facit per alium Memb. Umphrevil absente de licentia regis recognovit, & facit per J. S. &c.*]

[4. Generally of right, they who hold by escuage ought to be in the army in person; and it is not sufficient to find another to be there. Contra, Co. Litt. 70.]

[5. In the Exchequer, with Mr. Bradshaw, there is a roll which is intituled, *Negotia adjurnata de Scaccario ad Parliamentum Regis apud Karliolum in octabis Sancti Hilarii, anno 35 E. regis; in which there is thus, that Rogerus le Ware, who, upon summons, came to parliament, and said, that whereas he was summoned to be at Carlisle, 34 E. 1. personaliter cum servitio suo, he acknowledged, that he held by knight-service, and that he was there according to the summons.*]

[6. 7 E. 2. Rot. Finium Memb. 5. *Pro rege de finibus capiendis ab archiepiscopis, episcopis, abbatibus, prioribus, & omnibus ecclesiasticis personis ac mulieribus & aliis debilibus & ad laborandum impotentibus, &c. et servitia nobis facere debent.*]

7. If there be lord, mesne, and tenant, and each holds of the other by escuage, and the tenant goes a voyage into Scotland, the lord shall not have escuage of the mesne. The reason seems to be, inasmuch as there shall be only one service done for one and the same land; quære inde. Br. Tenures, pl. 89. cites 6 H. 3. & Fitzh. tit. Avowry, 242. & concordat Nov. Nat. Brev.

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The lord shall not have escuage of his tenant, unless where he himself goes into the war in person.

son. Br. Tenures, pl. 102. cites F. N. B. 83, 84.

Hawk. Co. Litt. 113. because the service originally reserved on the tenure, was performed.

If there be

lord and many several mesnees and tenants, and each holds by several knights service, if the tenant paravail of the land does the services, and goes with the king in war, &c. the same shall excuse all the other mesnees; for, for one land but one service can be demanded, viz. to go, or to find a man to go, &c. And so the mesne paramount here is excused, because the service is done by the tenant, &c. F. N. B. 84. (D)——S. P. Br. Tenures, pl. 103. cites F. N. B. 83, 84.

8. If 2 *jointenants* be of land holden by knights-service, and one goes with the king, it suffices for both, and both of them cannot be compelled to go; for by their tenure one man is only to go. Co. Litt. 70. b.

9. If the *tenant paravail* goes, it discharges the *mesne*; for one tenancy shall pay but one escuage. Co. Litt. 70. b.

10. An *abbot*, or prior, &c. that holds lands by knights-service, albeit he ought not, in respect of his profession, to serve in war in proper person; yet *must* he find a sufficient man, conveniently arrayed for the war, to supply his place. And if he can find none, then must he pay escuage, &c. for his profession does not privilege him, but that the king's service in his war must be done, that belongs to his tenure. Co. Litt. 99. a.

Fol. 510.

(U) Escuage. *Who shall have it.*

S. P. And so if he has ward, by reason of the vacation of bishoprick; and so shall a common person, if he has estate for life or years of a feignory. Co. Litt. 73. b.

[1. **T**HE king shall have escuage of those who ought to pay escuage to his ward. 31 E. 1. Rot. Scutagii Memb. 2. 7 E. 1. Rot. Finium Memb. 17.]

and so shall a common person, if he has estate for life or years of a feignory. Co. Litt. 73. b.

[2. If the king grants over to another the custody of his ward, and after there is a voyage-royal, the grantee shall not have escuage of the tenants of the ward, but the king.]

[3. 10 E. 1. Rot. pro Scutagio levando Memb. 2. But there the escuage was granted to the grantee *ex gratia speciali*. And so Memb. 3.]

[4. So the grantee of the king of his ward *cum feodis militum & advocacionibus* shall not have escuage of the tenants of the ward, but the king himself. 31 E. 1. Rotulo Scutagii Memb. 1. de jure; but the king granted this to him de speciali gratia.]

S. P. For he should have no benefit by the default of others, who was guilty of the like himself, Hawk. Co. Litt. 113.——But if the tenant goes with the king, and dies in exercitu, in the host or army, he is excused by law, and no escuage shall be demanded. Co. Litt. 72. b.

[5. He who was not with the king in the voyage, nor sent any one for him, nor had any lawful excuse for his absence, nor had made agreement with the king for his escuage due to the king, he shall not have any escuage of his tenants. This appears by all the rolls of escuage. Fitz. Na. 83. q.]

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[6. He who was with the king in another place at the time of the voyage by command of the king, shall have escuage of his tenants. 10 E. 1. Rot. pro Scutagio levando. M. 1. 8. 4. 31 E. 1. Rot. Scutagii Memb. 2.]

[7. Bishops,

[7. *Bishops, abbots, and women who had servitium cum rege, shall have escuage.* 31 E. 1. Rot. Scutagii Memb. 2.]

[8. He who was not in the voyage, nor sent any one for him, if he made a fine with the king for the escuage, shall have escuage of his tenants. 10 E. 1. Rot. pro Scutagio levando, Memb. 3. & Memb. 2. for him *qui regi satisfecit pro servitio suo.* 31 E. 1. Rot. Scutagii Memb. 2. 8 E. 1. Rot. Finium Memb. 8. Fitz. Na. Bre. 83. (I). Contra Co. Litt. 72. b.]

If he that holds of the king by escuage, goes, or finds another to go for him with the king, &c. then he

shall have escuage of his tenants that hold of him by such service, which must be assessed by parliament. But if the king's tenant goes not with the king, then he shall pay for his default, escuage, and shall have no escuage of his tenants. Co. Litt. 72. b.

[9. If the tenant of the king in socage has divers tenants by knight service, he shall not have upon a voyage-royal escuage of his tenants, if he does not go in the voyage, or agree with the king for it; but he shall have it if he goes with the king, or agrees with him. Fitz. Nat. 83. (I).]

[10. 31 E. 1. Rot. Scutagii Memb. 1. Vicecomiti Oxonii, *licet servitium dilecti & fidelis nostri Roberti de Veer, comitis Oxonii, nobis debitum in exercitu nostro Scotia 31, in rotulis marescalcie nostre de eodem exercitu non irrotuletur, nec fuerit recognitum ut est moris; volentes tamen ei hac vice gratiam facere specialem, concessimus ei scutagium, &c. Ideo habere facias de dono nostro & hoc nullatenus omittas.* The like in iisdem verbis, except de dono nostro.]

[11. He who was with the king, though he holds of the king but in one county, yet he shall have escuage of his tenant in every other county of England. 10 E. 1. Rot. pro Scutagio levando, Memb. 3.]

[12. The executors of him who was the king, shall have escuage. 10 E. 1. Rot. de Scutagio levando, Memb. 3.]

[13. So the executors of him who paid a fine for the service. Ibidem 31 E. 1. Rot. Scutagii Memb. 1.]

[14. So the executors of a bishop, qui habuit servitium cum rege. Ibidem 31 E. 1. Rot. Scutagii Memb. 1.]

[15. If escuage be granted, and after the mesne grants the services to another, and then escuage is levied of the grantee, he may levy this again of the tenants. 1 E. 3. 6. b.]

[16. So if escuage be granted in the time of the ancestor, and levied upon his heir, the heir shall have the escuage of the tenants. 1 E. 3. 6. b.]

17. The king or other who has seigniorie for term of years, or for life, or has seigniorie in ward, or by the temporalities of the bishop, or such like, shall have escuage, and yet he shall not have homage. Br. Tenures, pl. 103. cites F. N. B. 83, 84.

18. The lords of whom lands were holden by escuage, should have it when assessed; for the lands at first came from the lords, and it is not intended that they were given by them to the tenants, to defend them as well as the king. And the lords might distrain for it, or have a writ to the sheriff to levy it for them; but of such tenants as held of the king by escuage,

that went not to the war, the king should have it. Hawk. Co. Litt. 116, 117.

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(X) Escuage. Summons.

[1. 19 E. 1. **ROT.** Clausarum Memb. 7. in dorso, summonitio servitii, mandamus vobis in fide & homagio, quibus nobis tenemini, quod cum equis & armis & tali servitio, quod nobis debitis, sitis ad nos apud Northamptoniam ad faciendum servitium vestrum C. & nomina eorum qui summonentur C. Edmundo fratri regis, Johanni ballivo archiepiscopi Eborum, &c.]

[2. 5 E. 1. Rot. Scutagii Memb. 8. Breve de summonitione, quod interfitis cum equis & armis & cum servitio vestro nobis debito apud Wigorn tali die, &c. parati nobis cum ex inde proficisci in expeditionem nostram, &c. And several summons to each.]

[3. Rot. Scotiæ, 5. 6 E. 2. throughout. 8 E. 2. Memb. 10. Dorso super fidelitate.]

[4. See 11 E. 1. Rot. Walliæ Memb. 2. in dorso, and 3 in dorso, the manner of the summons.]

(Y) Escuage. Trial.

[1. **I**f it be not inrolled in the roll of the marshal, that J. S. was in the army, yet it may be testified by the king, by a bishop, by the chancellor, by the chamberlain, or other men of credit; and thereupon he shall have his escuage of his tenants. 10 E. 1. Rot. pro Scutagio levando, Memb. 3.]

[2. 31 E. 1. Rot. Scutagii M. 1. Vicecomiti Oxonii. *Licet servitium dilecti & fidelis nostri Roberti de Veer, comitis Oxon nobis debitum in exercitu nostro Scotiæ 31, in rotulis marescalcie nostre de eodem exercitu non irrotuletur nec fuerit recognitum ut est moris. Volentes tamen ei hac vice gratiam facere specialem concessimus ei scutagium, &c. Ideo habere facias de dono nostro & hoc nulla tenus omittas.* The like in iisdem verbis, except de dono nostro.]

[3. In the bag of tenures in the Exchequer, there is a roll, of which the title is *Negotia Adjurnata de Scaccario ad Parliamentum Regis, apud Karliolum, in octabis Sancti Hilarii, anno regni regis Edwardi 35. where Theobaldus de Verdon fuit attachiatus ad respondendum quare non venit apud Karliolum in quindena sancti Johannis cum servitio suo quod regi debuit in exercitu Scotiæ, anno 34, &c. Et ipse venit & dicit quod fecit domino regi servitium suum quod regi, &c. & inde vocat ad warrantum recordum consilabulariorum & marescaliorum exercitus regis & datus est ei dies de habendo warrantum suum ad parliamentum predictum.* And so in the same roll; *Rogerus de la Ware attachiatur ad respondendam regi, &c. qui venit & dicit quod fecit domino regi servitium suum in exercitu predicto, & petit diem de habendo warranto suo, &c. Et ad hoc dies datus est ad parliamentum predictum.*]

4. When

4. When the lord distrained for escuage assessed by parliament, if the *tenant* would *aver*, that he was with the king all the days required, and the lord averred the contrary, it should be tried by the certificate of the marshal of the king's host, under his seal, sent to the justices. Hawk. Co. Litt. 117.

Litt. f. 102.
—At the
muster of
the king's
host, the
marshal gave
a certificate

under his hand and seal to all the tenants that there attended, which was an uncontested evidence of their attending the King in his expedition. When escuage was assessed upon the tenants in parliament, every tenant might have his certificate into the court of Exchequer; and upon such certificate the barons discharged him out of the king's rent roll; for such certificate of the marshal, inrolled in the court of Exchequer, was an authority to the barons to discharge the pipe-roll of an escuage upon such tenant, that so no distringas issued upon such escuage. If the king's tenant had not inrolled his certificate, then the distringas regularly issued; but the tenant might plead such certificate at the return of the distringas, and get the discharge. But however the distringas did originally issue, because he had not inrolled his certificate; where it was inrolled, it was never in discharge to the sheriff; where it was pleaded upon the return of the distringas, the sheriff was fined till such certificate produced. If any inferior tenant was distrained by his landlord for escuage, he might replevy; and if upon such replevin he could plead, that he was with the king in the expedition, and shew his certificate from the marshal, the tenant might have a recordari of such plaint before the sheriff, and thereby bring it before the justices in eyre; and upon producing such certificate before the justices, the justices granted a writ *de returno habendo* of such distress. Gilb. Hist. View of the Exch. 24, 25

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(Y. 2) Frankalmoign.

1. **PRIOR** held in frankalmoign and infeoffed J. S. in fee, and the lord after the limitation of assise got services, and brought *cessavit* for not doing them; and it was said, that the *feoffee* cannot hold by frankalmoign, as the prior held; therefore he shall hold by the services accroached, or by fealty only, or as the donor held over, and yet the demandant was barred upon his count of services accroached. Br. Tenures, pl. 39. cites 31 E. 3. and Fitzh. Cessavit, 22.

2. In trespass it was in a manner agreed arguendo per Cur. that where the lands of the *Templers*, which were dissolved, and held of the king in frankalmoign, and their lands given by act of parliament to the hospital in fee, to hold by the same services as the *Templers* held, these words do not make frankalmoign; for frankalmoign is not any service, and by some it cannot be, because frankalmoign cannot be but of the donors. But Brooke says, it seems to him that it may; for though it cannot be but of the donors by the common law, yet otherwise it may be by the act of parliament, which may make a new law varying from the common law. Br. Tenures, pl. 5. cites 35 H. 6. 56.

3. At this day a man cannot give land to hold in frankalmoign to an abbot in fee; for by the statute of tenures, he shall hold of the lord paramount, of whom the donor held. Contra before this statute, which is called *quia emptores terrarum*. Per Littleton. Br. Tenures, pl. 39. cites 12 E. 4. 3, 4.

(Z) Tenure in * Socage.

* Tenure in socage is where the tenant holds of his lord by certain service, as fealty, and certain rent,

for all manner of services. And at this day every temporal tenure of a common person is in socage; for though, in a strict sense, it only signifies that in which the service of the plough was originally reserved, yet largely taken it comprehends all others that have the like effects and incidents; as if a rose, rent, or the doing the duties of an office were originally reserved; and at law every temporal tenure of a subject that was not knight's service, was socage. Socagium idem est quod servitium socæ, i. e. a plough; and anciently such tenants ought to come with their ploughs for certain days in the year to plough and sow the lord's demesnes, or do other works of husbandry. And afterwards such services were changed into annual rent, and yet the name of socage remained; such charge must be before time of memory; for at this day they cannot be changed by release, confirmation, or any other conveyance, so long as the seigniority remains. And in some places they still do such services with their ploughs to their lords. Hawk. Co. Litt. 132, 133.

† S. P. So that this tenure which at first was slightly esteemed of, is now accounted much the better; for the original labours are converted into a moderate sum of money, only the value of the yearly rent is exacted for relief, and it is obliged neither to ward or marriage. Cowell's Institutes, lib. 2 tit. 3. f. 21.

† S. P. And Brooke says, the reason seems to be inasmuch as the 6d. is certain, and therefore it cannot be but socage certain, which is socage, as appears in Littleton's tenures. Br. Tenures, pl. 29. cites S. C.

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Fol. 512.

Incidents.

Br. Tenures, pl. 30. cites S. C. and says, that the best opinion was that, because the relief was put in certain, [viz.]

pro dimi-

dia marca, that it is socage, and not knight-service; for of socage, relief shall be paid as well within age as of full age, & adjournatur quære.

[2. If at the common law a man had given land in fee, to hold by knight-service, and had granted to the donee and his heirs, that they should pay so much for relief, when it is to be paid for ward, marriage, and all exactions, the donee should hold by knight-service, and yet he should not be in ward, though it be incident to knight-service, but not inseparable. 31 Aff. 15. dubitatur.]

[3. So it is in the said case, though it be also granted generally, that he shall not be in ward, nor shall pay nothing for his marriage. 19 E. 2. Avowry, 224. By Herle said to be adjudged, though it be knight-service.]

[4. If a man gives by deed to a prior and covent land absque homagio & fidelitate, habendum & tenendum de se, & heredibus suis reddenda inde annuatim 10s. tantum pro homagio & fidelitate & pro omnibus que de dicta terra exigi poterunt, salvo tamen scutagio domini regis quando currit. Though this be knight-service, and though homage and fealty are incident to knight-service, yet he shall not avow for them against the deed. 19 E. 2. Avowry, 224.]

[5. If a man holds by fealty, and 12d. rent, and the lord releases or confirms the estate of the tenant, to hold by 2d. for all services and

and demands; this shall bar the lord of relief. Kelloway in certi temporis, 136.]

[6. If a man holds land *at will, rendering rent*, this is not a rent-service; for fealty is not incident to it, but it is a rent distrainable of common right. Co. Litt. 37. b.]

7. If a man holds his land *to pay a rent to his lord for castle-guard*, this tenure is tenure in socage; *but where the tenant ought by himself, or by another, to do castle-guard*, such tenure is tenure by knights-service. Litt. f. 121.

Herein the difference stands thus: If a rent be paid for castle-

guard, it is clear a socage tenure, as it is agreed in LUTTERELL'S CASE, according to Littleton's opinion. But if a sum in gross, or other thing, be voluntarily paid or given by the tenant, and voluntarily received by the lord in lieu of castle-guard, yet the tenure by knights-service remains. Co. Litt. 87. a. b.

8. Lands held of a manor in ancient demesne, shall be held by no other service than socage. F. N. B. 13. (D) and 14 (B).

9. Every tenure which is not tenure in chivalry, is a tenure in socage. Co. Litt. 86. a.

10. If a man hold by homage, fealty, and escuage, viz. by an halfpenny, when escuage runs at 40s. this is a tenure in socage, and no knights-service, for 2 causes; first, it is socage tenure, because of the certainty; for to the tenure in socage certa servitia do ever belong, so as the husbandman may the rather live in quiet. 2dly, Escuage is to be paid at every time when it is assessed, and here it is not to be paid but when it amounts to 40s. Co. Litt. 87. a.

11. He that held by escuage certain, i. e. to pay his lord a certain sum for it, at what rate soever the parliament assessed it, held in socage. If one speak generally of escuage, it shall be intended of escuage incertain, because that is the worthiest sense. Hawk. Co. Litt. 116.

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12. The service which is performed by tenants in fee farm, is socage, in regard fee-farm cannot be where ward and marriage are reserved to the lord by charter. And the same is to be understood of tenants in franck bank. Cowell's Institutes, lib. 2. tit. 3. f. 26.

(A. a) Alteration. In what Cases the Tenure shall be changed, and how. See (L. 2).

[1.] If there be lord, mesne, and tenant, and the tenant by his act [as] by purchase, forejudger, and the like, is party to the alteration of the tenure, there he shall hold as the mesne held before; for he comes in loco mesni; and on the contrary, where the mesnalty is determined by the act of God, as by elcheat without heir, and the like; for there the feignior will merge in the mesnalty, and the mesnalty will remain, and the tenant shall hold as before. Brook, Tenures, 297.]

Br. Tenures, pl. 97. cites 22 E. 3. Fitzh. Dower, 131. — Lord, mesne, and tenant by rent; tenancy by purchase,

descent, or other law means comes to the lord in fee-simple; the tenure and all things which were incident to the tenure, are extinct and gone, because the lord cannot hold the land of his own tenant. But though the feignior is extinct, yet the rent is not gone; if no rent due from the mesne to the lord, then

then all the rent continues; if any rent, then it continues for the surplusage, as rent service distrainable of common right. But so long as the land continues in the hands of the king, the distress is suspended, and the remedy is by petition. But when the king grants it over, then the mesne shall distrain the patentee. Resolved, Jo. 234. Pasch. 7 Car. B. R. Faulker v. Bellingham.

[2. [So] if there be lord, mesne, and tenant, and the tenant holds by more services than the mesne, and the mesne is attainted of felony, by which the mesnalty escheats to the lord, the lord shall have the same services of the tenant as the mesne had of him before; for he is now become tenant to the lord, by reason of the mesnalty to which his services were annexed. 1 E. 3. 6. by Tond.]

[3. So shall it be in the case aforesaid, though the tenant held by less services of the mesne than the mesne held over, yet he shall pay but the same services which he paid before, for his tenancy is not altered; but the mesnalty to which the services are annexed is come to the lord paramount. 1 E. 3. 6.]

D. 359. b.
pl. 1.

* Fol. 513.

[4. [So] if lord, mesne, and tenant are, and the mesnalty is a manor, and held of the king in capite, a tenant paravail, who holds of the manor by socage tenure, obtains a release of the mesne, now his tenure [is] immediate * of the king in capite, as the tenure of the manor was, because the mesnalty is extinct by his own consent; and *volenti non fit injuria*. D. 19, 20 El. 359. 1 Da. County Palatine, 67.]

S. P. 2 Inst.
502.—So
if the te-
nant in-
scuffs the
mesne, the
mesne shall hold by the same service as he did before. 2 Inst. 502.

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† Br. Te-
nures, pl.
37. cites
S. C. be-
cause the
seignior
is extinct in
the mesnal-
ty; per
Danby Ch. J.

[5. If lord, mesne, and tenant are, and the mesne releases to the tenant, the tenant shall hold of the lord by the same services as the mesne held for the cause aforesaid. 7 E. 4. 12. 22 E. 3. Brook, Tenures, 97. Fitzherbert, Dower, 131.]

[6. If lord, mesne, and tenant are, and the mesnalty escheats to the lord upon the death of the mesne without heir, the tenant shall hold of the lord by the same services as he held before. 7 E. 4. 12. by Needham. Davie's County Palatine, 67. Co. Litt. 99. b. D. 30 H. 8. 44. 30. and the seignior is extinct. 10 Aff. 29. adjudged. † 2 E. 4. 6. by Danby. 1 E. 3. 6. Brook, Tenures, 91. Fitzh. Avowry, 258.]

See pl. 16.
in the note
upon the
words (by
such ser-
vice, &c.)

[7. If lord, mesne, and tenant are, and tenant holds in frankalmoigne, and mesnalty escheats to the lord upon death of the mesne without heir, there the tenant shall hold of the lord by the same services as the mesne held; because he cannot hold in frankalmoigne as he held of the mesne, the lord being a stranger to the blood. 7 E. 4. 12. (it seems he shall hold it as near it as may be, that it to say) by fealty only.]

Where
lord, mesne,
and tenant
are, and the
tenant fore-

[8. If the tenant forejudges the mesne, he shall hold of the lord by the same services as the mesne held before of the lord; for it is his own act. 22 E. 3. Dower, 131. Brook, Tenures, 97. 10 Aff. 29.]

judges the mesne, and is in arrears to the lord, he accepts the services by the hands of the tenant, (as he ought,) yet he may distrain him, and avow upon him for the services of the mesne; for it is the folly of the tenant to forejudge the mesne. And the best opinion was, that the tenant may rebut the lord by deed made to the mesne for an encroachment of the lord, as the mesne himself may. Br. Tenures, pl. 80. cites 7 E. 3. Fitzh. Avowry, 242.

S. P. For the ancient feignory remains, and the statute wills this. But where lord, mesne, and tenant are, and the tenant holds of the mesne by 3 halfpence, and the mesne over of the lord by 4d. and the mesne dies without heir, the lord is seised of the 3 halfpence, and may bring thereof assise upon disseisin, and recover upon the matter; for the feignory is extinct in the mesnalty, so that he shall have only the services which the mesne should have had, and not the services which the mesne paid to the lord; quod nota. Br. Tenures, pl. 27. cites 10 Aff. 29.

[9. If lord, mesne, and tenant are, and the *mesnalty comes by purchase to the lord*, the tenant shall hold as he held before. Davie's County Palatine, 67. D. 30 H. 8. 44. 30.]

[10. So if the *mesnalty descends to the lord*, the tenant shall hold as he held before. Davie's Reports, 67. D. 30 H. 8. 44. 30.]

[11. If lord, 2 mesnes, and tenant are, and the *last mesnalty descends to the first mesne*, this first mesnalty is extinct, because he by this comes more near to the tenancy, and yet the first mesne shall hold of the lord paramount as he held before. Co. Litt. 99. b.] If there be lord, mesne, mesne and tenant, and the first mesne dies without
 heir, and the *mesnalty escheats to the 2d mesne*; or if the *mesne grants the mesnalty to the mesne*, the mesnalty which is nearest to the tenancy doth drown the more remote mesnalty, and the tenant shall hold per eadem servitia & consuetudines, as he held before; but the 2d mesne shall hold of the lord paramount per eadem servitia & consuetudines, as he held before the extinguishment of his mesnalty for the cause aforesaid. 2 Inst. 502.

[12. If lord and tenant are by *castle-guard*, and the *lord grants over the feignory*, the castle-guard is gone, because the grantee has not the castle. Co. Litt. 83. a. and this is not a tenure by knight-service, as it was before.] 4 Rep. 86. b. in LUTTEREL'S case, Arg. cites 31 E. 1. tit. Aff.

441. and said there that the alienee cannot build a new castle; for the tenure was to keep the old castle.

Service of castle-guard and suit to the mill cannot be severed from the castle, nor from the manor, so that grant thereof is void. Br. Tenures, pl. 11. cites 1 Aff. 441.

[13. If *A. holds of B. as of his manor of D. by fealty and suit of court*, and *B. grants over the feignory*, the suit is gone, because the grantee has not the manor. Co. Litt. 83. b.]

[14. But if lord and tenant are by *castle-guard*, and the *castle be utterly ruined*, yet the tenure remains by knight-service, and this goes in benefit of the tenant as to the guard of the castle, till it be rebuilt. Co. Litt. 83. c.]

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[15. If the king makes *release to his tenant in capite to hold by a penny and not in capite*, this is a void release and does not alter the tenure; for it is merely incident to the person and crown of the king. D. 30 H. 8. 45. 35. [36.]

16. * 18 E. 1. cap. 1. Forasmuch as purchasers of lands and tenements of the fees of great men and other lords, have many times heretofore entered into their fees, to the prejudice of the lords to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands, and tenements belonging to their fees, which thing seemed very hard and extreme unto those lords, and other great men; and moreover in this case manifest *disbenefit* in ce :

* It is called the statute of Westminster 3. because two notable parliaments had been before holden at Westminster, the one called Westminster 1, and the other

called Westminster 2; in respect whereof, and the excellency of it, this parliament being holden at Westminster, is called Westminster 3. 2 Inst. 500.

Before

Before this statute, if tenant by knight service had made feoffment, the feoffee by the law should hold as the tenant held over, viz. by knight service, and if the feoffor had after procured a release to hold in socage, the feoffee should hold in socage likewise. Per Doderidge J. quod fuit concessum per Coke Ch. J. Roll: Rep. 106. in case of Spink v. Tenant cites 49 E. 3.

If a man before this statute had made a gift of land to one in fee, to repair a bridge or to keep such a castle, or to marry annually a poor virgin of S. this had been a tenure, and the donor might have distrained and made avowry, and is not a condition; but if a feme gives land to a man to marry her, this is a condition in effect, and no tenure. Per Fitzherbert, quod nemo negavit. Br. Tenures, pl. 53. cites 24 H. 8.

At the common law, if A. had made feoffment in fee to B. reddend' inde five tenend' de se & heredibus suis per 6 d. pro omnibus servitiis & faciendo capitalibus dominis feodi pro prædict' A. & heredibus suis omnia servitia debita, &c. In this case by the first reddend' or tenend' the land had been holden of the feoffor, and all the services due shall be done to him: for to do service for a man, is to do it to him; qui pro me aliquid facit, mihi fecisse videtur. 2 Inst. 501.

* By the common law, the tenant might have made a feoffment in fee of the whole tenancy, to

*Our lord the king in his parliament at Westminster after Easter, the 18th year of his reign, that is to wit, in the quinzime of Saint John Baptist, at the instance of the great men of the realm, granted, provided, and ordained, that * from henceforth it shall be lawful to every † freeman to ‡ sell at his own pleasure, his lands and tenements, or part of them,*

be holden of the chief lord; but notwithstanding the lord might, during the life of the feoffor, take him for his tenant, and avow upon him (in respect of the former fealty, service, and privity) albeit the feoffee gave notice and tendered him all the arrearages, which this statute has altered. 2 Inst. 501.

† i. e. Libere tenenti, to every freeholder, hereby are excluded, not only nati, but also native tenants, copyholders, or tenants at will, according to the custom of the manor. 2 Inst. 501.

‡ This is not only taken for a sale, but for any alienation by gift, feoffment, fine, or otherwise; but sale was the most common assurance. 2 Inst. 501.

¶ The general words of this act

So that the feoffee shall hold the same land and tenements of the chief lord of the same fee

take not away necessary incidents, as that the feoffee of all, or of part, shall give notice, and tender the arrearages before the lord shall be compelled to avow upon him; neither do these or the former words (de cætero liceat) take away the fine for licence of alienation, &c. of lands holden of the king in capite, for that belongs to the king by the said statute of magna charta. See Magna Charta, cap. 32. 2 Inst. 501.

These general words have a tacite exception, viz. unless all the lords mediate and immediate do assent thereunto; for quilibet renunciare potest beneficio juris pro se introduct'. 2 Inst. 501.

§ This is taken for the next immediate lord, and so by degrees upward to every lord paramount; albeit the act speaks in the singular number; and it is to be known, that all the lands and tenements in England, are holden either mediately or immediately of the king, and therefore he is summus dominus supra omnes. 2 Inst. 501.

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¶ A. holds lands by

*By such services and ** customs as his feoffor held before.*

knights service, and gives the same to B. in tail, to hold of him in socage; B. makes a feoffment in fee, the feoffee shall not hold of the lord in socage, as the feoffor held, but by knights service, as A. the donor held; for by the feoffment the reversion in fee holden by knights service, is drawn out of the donor, and passes to the feoffee, and the feoffee in this case cannot hold of the donor; and this case is not against the letter of the law, but within the intent and meaning thereof; for the meaning of this law was, that the feoffee should hold of the lord, as the feoffor did when the feoffee held of the same lord; and this act was made for the advantage of the lords; and therefore in construction the feoffee shall hold, not as the feoffor, but as the donor held. 2 Inst. 502.

Also, if the tenant that holds by priority make a feoffment in fee, the feoffee shall not hold by priority; for this act says, per eadem servitia, by the same services, and not according to every collateral quality. 2 Inst. 502.

If the tenant in frankalmoign aliens in fee, the feoffee shall not hold of the lord per eadem servitia, albeit he be a man of the church; but he shall hold of the lord by fealty only; for by the first words of this act he shall hold of the lord, but he cannot hold of the lord per eadem servitia, because it is against the nature of the tenure in frankalmoign to hold of any but of the donor or his heirs, and general words of an act shall not be taken to work any thing against the nature of the thing, or the rule of law, but he shall hold by fealty only, which was as free a tenure, and as near to the former as can be, and therefore by construction (eadem servitia) the same services shall be taken as near the same services as may be. 2 Inst. 502.

The

The archbishop of C. seised of land in right of his archbishopric, and held of the king in frankalmoign, after this statute made a feoffment in fee to J. S. and the dean and chapter confirmed it. The question was, if the land shall be held of the king in capite by service of chivalry or socage in capite? It was resolved upon this statute, that the land shall be held of the king in socage, and not in capite, and this by reason of this statute, for before this statute he should hold of the bishop, and not otherwise; but now this statute provides that it shall be lawful to alien his land, but the statute is *vendere, notā hoc, &c.* so that the feoffee shall hold the land of the chief lord of that fee, by the same services as his feoffor held before, the which cannot be in this case. For he cannot hold of the king in frankalmoign, nor by the services which the feoffor held by; and therefore he shall not hold in capite by the meaning of this statute, which shall be taken the most reasonably for all parties concerned. 2 And. 211. pl. 30. in the court of wards, Rotheram v. Wood.

A diversity was taken, when the king grants land, and reserves no tenure, or when a clause is *absque aliquo reddendo*, there the law creates a tenure, the best it can for the king; but when the land passes from a subject, and the law, of necessity, changes one tenure into another, it will create one as near the freedom of the first tenure as may be; as if a bishop or other man of the church had held land of the king in frankalmoign, and at the common law had infeoffed another and his heirs of the same land, in such case the feoffee should hold by fealty only; for this is as near the freedom of the tenure in frankalmoign as may be, and so it was resolved in *LONG'S CASE*. And the reason of this diversity is, because in the first case the land moves from the king, and therefore shall be subject to such tenure as the law will create; but when tenant in frankalmoign infeoffs another, the feoffee is in by a subject and not by the king. so as the king parts with nothing; besides, in the last case the law does not create any tenure originally as it does in the first case, but only changes one tenure into another, viz. frankalmoign into fealty only. 9 Rep. 123. a. b. Trin. 7 Jac in the court of wards in *Lowe's case*.—Litt. f. 139. and Coke's Comment upon it, pag. 98. a. S. P.

This act extends to lands holden by *fee farm*. 2 Inst. 502.

Custom is here taken for services as in the writ de consuetudinibus & servitiis, and not for customs. 2 Inst. 502.

If the tenancy comes to the mesne by act in law, as by escheat or descent, the mesne shall hold per eadem servitia & consuetudines, as he held before; for albeit the tenure between the tenant and the mesne in these cases be extinct, yet the seigniorie paramount, which also was issuing out of the tenancy, remains still. 2 Inst. 502.

The king may licence a man to alien, and to make a tenure at this day, where he is his tenant immediate; and the king and the other mesne lords may licence other tenants to alien and make tenure at this day. But the lords only cannot; for the statute was for the advantage of the king and lords, and the king is not bound thereby; and so the king and the lords may dispense with this statute. Br. Tenures, pl. 65. cites F. N. B. fol. 211.

S. P. That the king is not bound by this statute, because all land must be held, and therefore if he shall not hold of the king, he will hold of nobody. Roll. Rep. 165. in the case of *Smith v. Warren*, alias *Magdalen College's case*.

17. If a man had given land before the statute to hold of the chief lord, the feoffee should have held of the chief lord; and if the lord had released and confirmed to the tenant to hold in frankalmoign, he should have held in frankalmoign thereby. And so see that tenure may be altered by confirmation. But it seems that it is only a diminishing; for he does no services. Br. Tenures, pl. 71. cites 4 E. 3. Fitzh. tit. Mesne, 41.

† A man held 2 acres of J. S. by two several tenures and by 5s. rent, and the lord confirmed the estate of the

tenant to hold by 4d. for all services, it was held that this shall not make the tenant to hold by one entire tenure where he held by several services before. Br. Tenures, pl. 59. cites 2 H. 6. 9. 8. [But it seems it should be 9 H. 6. 8. b. 9.]

† On confirmation to the tenant the lord cannot reserve new services, as hawk for rent, or rent for hawk. 9 Rep. 142. Pasch. 10 Jac. in the court of wards in *Beaumont's case*.

‡ [237]

18. In assise; the king, lord, mesne, and tenant are, the tenant held of the mesne by socage, and the mesne over in chivalry; the tenant gave his land to his daughter with her baron in frankmarriage rendering 12d. per annum for all services salvo forinfeco servitio; and it was held that the donor cannot have service of chivalry by these words (forinfeco iervitio); the reason is, because he himself held only in socage; for it appears here, that the foreign service are such services by which the donor holds over. But per Wilby, they are such services by which the land is held,

Br. Tenures, pl. 95. cites S. C.—Thorp Ch. J. said, that when a man gave land before the statute, to hold by 2d. for all services, salvo

and

forinfeco
servitio, yet
he shall hold
by service
of chivalry
if the feof-
for held
over by ser-
vice of chi-
valry, by
reason of
the salvo,
&c. And
if a man in-
feoffs ano-
ther, ren-
dering a rose
per annum
& faciendo
capitali do-
mino servi-
tium debi-

tum pro feoffatore & heredibus suis, that which he shall do for him he shall do to him, and therefore he holds in chivalry. But Mowbray contra, for the first words (for all services) discharge him, and the last words are not sufficient to contradict the first. And Brooke says, the law seems to be with him; for the deed shall be taken more strong against the feoffor, and there is no reservation nor exception of escuage. Br. Tenures, pl. 31. cites 31 Aff. 30.

* S. P. Br. Reservation, pl. 33. cites 31 Aff. 30.

and the mesne holds over by chivalry, though the tenant holds only by socage; and he adjudged accordingly, which was contrary to the opinion of several, and therefore error was thereof brought in B. R. And it was said, that this word * (*salvo*) is sufficient to save that which is in esse, which was only socage here; but it is not sufficient to reserve that which is not in esse, as service of chivalry here, if he does not say *reddendo vel faciendo*. And per Wilby and Green, that of which the donor is charged over may be reserved by this word (*salvo*). And per Wilby, escuage certain is socage, and escuage uncertain is service of chivalry; and a man may hold by homage and yet not in chivalry, but in socage, per Wilby. And the best opinion was, that by these words *salvo forinfeco servitio*, the donor shall have only such services by which he himself is charged over, and not such services which his mesne or other lords paramount is charged for the same land; quod nota. Br. Tenures, pl. 28. cites 26 Aff. 66.

19. Lord and tenant by service of 6 marks, and to find a chaplain for ever, the lord released by fine in writ of customs and services to hold by 6 marks, and rendering half a mark for the chaplain, and after devised the 6 marks and died, and in assise all was found by verdict at large, and the plaintiff recovered. Brooke says, quod mirum! that he may change the services, or reserve rent upon fine of release. Br. Tenures, pl. 49. cites 26 Aff. 37.

20. In assise deed was shewn by which land was given to A. B. and his heirs to hold of the feoffor and his heirs by 6d. for all services, and *ex illis sex denariis scutagium solvi debeat quum evenerit quantum pertinet ad tertiam partem unius acre terre*; and per Seton he holds in socage by these words (6d. for all services). And these words (*scutagium debet*, &c.) are not words of reservation, as *reddendum scutagium*, nec *salvo scutagio*, therefore it is only socage. Br. Tenures, pl. 31. cites 51 Aff. 30.

21. If a man gives land in tail *tenendum libere & quiete*, the remainder over *tenendum in forma predicta, reddend. 2s. per annum*, the first estate is discharged of the 2s. and not the remainder, otherwise it seems if *libere & quiete* was not expressed before. Br. Tenures, pl. 92. cites 34 E. 3. & Fitzh. Avowry, 285.

22. If manor be converted into a priory, yet the tenure remains, and the lord may distrain; for alteration shall not prejudice the lord. Br. Tenures, pl. 55. cites 42 E. 3. 7.

23. If a man holds an acre of land of J. S. by fealty and suit as of his manor of Dale, and J. S. is also seised of another manor called T. and J. S. grants unto the tenant that he shall do his suit at his manor of T. † this grant shall not determine the suit at the manor of Dale. Perk. f. 70.

† [238]

S. P. Br.
Suit, pl. 44.
cites Fitzh.
tit. Action
sur le Sta-
tute, pl. 24.
& E. 2.

F. N. B. tit. Cont. Form. Feoffamenti.

24. And

24. And if J. S. in the same case had granted unto his tenant that he shall give unto him 12d. yearly for his suit; this grant shall not determine nor alter the tenure. Perk. f. 70.

25. If lord and tenant be, and the tenant infeoffs the lord of the tenancy upon condition, the lord may grant his seignior, and yet it is not determined nor extinguished; for if the condition be broken, and the tenant enters, the seignior is revived. But if before the entry of the tenant the lord infeoffs a stranger of the tenancy, and then the first feoffor, that is to say, the tenant enters, the seignior is not revived but is determined, because that the lord departs with the tenancy to his feoffee discharged of the seignior. And so in the same case the lord may depart with his seignior by such means, &c. Perk. f. 89.

26. If there be lord and tenant by knights-service, viz. by homage, fealty, and escuage, and 12d. rent, and the lord grants the rent unto a stranger saving unto him his seignior, it is a good saving; but notwithstanding that, the lord shall have the escuage, and yet it is not but a payment of money if the tenant will, and the grantee shall have the 12d. rent as a rent seck, &c. Perk. f. 648.

27. If before the statute of quia emptores terrarum, there had been lord, mesne, and feme tenant, and the mesne and the tenant had intermarried, the same should not have altered the lord's avowry; or if the tenant had infeoffed the mesne of the tenancy, it should not have altered the avowry of the lord, &c. Perk. f. 654.

28. If lord, 2 jointenants mesne, and tenant had been, and every of them held of the other by fealty, and 12d. and the tenant had infeoffed one of the joint mesnes before the statute of quia emptores terrarum of the whole tenancy, it seems the feoffee shall hold one moiety of the tenancy of him who was his joint mesne by fealty, and 6d. rent. Perk. f. 655.

29. See the form of a fine levied upon a writ of customs and services, where it is recited, that whereas there was a dispute about castle-guard and murage, now the lord concessit quod ipsi, &c. sint quieti de predictis servitiis, salvo omnibus aliis servitiis ad predictum tenementum pertinentibus. It seems that the discharge of the murage and castle-guard, which it may be were not of right due, is no discharge of the tenure in chivalry. D. 179. b. pl. 46. Pasch. 2 Eliz. Bruse v. Bonet.

See Bendl. 116. pl. 149. S. C. says, this was before the statute of quia emptores, and the fine was given in evidence in an issue to be the old duke

tried in the manner of a writ de valore maritagii in Suffex, at the suit of the executors of of Norfolk v. Keeds.

30. If a man has lands which were parcel of the possession of a chantry, &c. and came to the king by the statute of dissolutions, and before were held of a common person by rent and fealty, or by service in chivalry, now the patentee of the king shall hold according to the patent, and not of the ancient lord, or of his heirs by the former service, but he shall pay the same rent, which before was rent-service, as rent-charge distrainable of common right only by the former lord and his heirs; and so the saving in the statute

3 Le. 58. pl. 85. S. C. accordingly. 4 Le. 40. pl. 109. S. C. and reported in the same words. — Bendl. 237. pl. 264.

was

Mich. 16 & 17 Eliz. S.C. accordingly. was expounded. And. 45. pl. 115. Mich. 16 & 17 Eliz. Stroud's case.

[239] 31. A writ of disceit by the lord of the manor in *ancient demesne*, upon a fine levied of land there; the defendants *pleaded that the lord of the manor in the time of E. 2. released to one who was tenant of the same land by fine de omnibus servitiis & consuetudinibus, salvo servitiis infra scriptis, viz. pro una virgata terræ 2 s. rent, suit of court, and relief* And the release was *de uno messuagio & una virgata terræ*. It was held, that the custom of the ancient demesne was extinct by the release, but that the rent, relief and suit of court remained as parcel of the feigniory by the saving. And adjudged accordingly. Mo. 143. pl. 285. Mich. 25 & 26 Eliz. Griffith v. Clarke.

32. King Edw. 3. was lord, abbot of *W. mesne*, and C. was tenant. C. was attainted of treason. Office was found. The king granted the land to M. and his heirs, *tenendum de nobis & successoribus nostris & aliis capitalibus dominis feodi illius per servitia inde prius debita, & de jure consueta*. It was argued (among other things), that this was now a tenure of the king immediately, and not of the mesne, because the words were not *per servitia* (*ante proditionem*), or (*ante attincturam*) *inde prius debita, &c.* And divers offices and licences of alienations and other records were shewn to the Court, by which it appeared that the law had been so taken all along, that the said manor was held of the king in capite. But as to the said offices, licences, and other records, the barons said, that *since by construction of law upon the said letters patents, it appears that there is no immediate tenure of the king, notwithstanding it has been found otherwise in offices, or admitted in licences or other records, yet this cannot alter the true tenure which originally appears of record to them as judges; and that though consuetudo sit magnæ autoritatis, nunquam tamen præjudicat veritati*. 6 Rep. 5. b. Hill. 40 Eliz. in Scaccario, Sir John Mollyn's case.

• And Ld. Coke cited a case, Mich. 39 & 40 Eliz. in the Exchequer accordingly; because the plea has relation only to the licence or pardon; but otherwise it is where the party is directly charged with a tenure, as by *habe & verum est, &c.* For in such cases the plea is a conclusion.

33. A. seised in fee of land held of queen Eliz. as of the fee of crown-land, whereof she was seised in fee by admittance, procured a licence from her, and suffered a common recovery, and made a jointure on his wife. A. and the wife died, and the land descended to B. as cousin and heir of A. B. sold the land to C. who died seised, and the land descended to D. as son and heir to C. This was found by office; and further, that the said land at C.'s decease was held of queen Eliz. and at the inquisition was held of the king now by knight-service in capite. Resolved by Coke and Tanfield, that the ** suing the licence of alienation is no conclusion to the party, so as to make the lands to be held of the king in capite*, because the words of the licence are (*quæ de nobis tenentur in capite, ut dicitur*), but yet that the same may be used as some part of evidence for the king to prove such a tenure. And decreed that the tenure should be taken as a mesne tenure, and not a tenure in capite. Ley, 16. Mich. 7 Jac. Davison & Dymmock's case.

34. Two tenants held of C. by unequal rents. C. gives, grants, and confirms, &c. the said rents, services, and seigniories to them 2 and their heirs; this is an extinguishment of a moiety of every of the tenures, and for the other moiety they hold one of another; it was said that if the acres and rent had been equal, that then it should be *extinguished* in all; but, as it was, there was a *cross tenure* between them as to one moiety, and that shall not move as a release reddendo singula singulis. Noy, 113. Goldwell v. Naven-den, cites D. 319. 11 H. 7. 12. a. 39 H. 6. 2. 49 E. 3. 40.

35. A. seised of the manor of W. held in capite, purchased a freehold of 7 acres held of the same manor in socage. Resolved by the Lord Ch. J. Mountague, and Hobart, and Tanfield Ch. B. that the 7 acres purchased by A. is held of the king in capite by knight-service, as the manor of W. is held, and of which the said 7 acres were held in socage till such purchase. Ley, 63. 65. Pasch. 17 Jac. Mountague's case.

(B. a) *Extinguished.* What Act will extinguish it.

[240]

See Heriot (H).

[1. IF the king purchases land which is held of others, by this all the services are extinct. 47 E. 3. 21. b. by Finchden.]

Br. Tenure, pl. 9. cites S. C.

[2. If my tenant infeoffs the king, and retakes estate from the king, my tenure is extinct. Contra, 45 E. 3. 6. he shall hold of both.]

Fol. 514.

Br. Tenures, pl. 56. cites

S. C. that he is my tenant in right, and shall hold of the king also; per Finch. Brooke says, quære of his holding of me; for the tenure was once extinct by the possession of the king.

[3. If the king has land by forfeiture of treason, by this all tenures are extinct as well of the king as of others. Co. 6. MOLYNS, 5. b.]

[4. If lord, mesne, and tenant are, and the tenant gives the land in tail, the remainder in fee to the king, if he assents to the remainder the mesnalty is extinct, because the king can hold of none; (and the particular estate and remainder are all one estate in law, and both hold of the lord paramount.) D. 4, 5 Ma. 154. Co. 2. BINGHAM, 92. b.]

D. 154. b. pl. 18. 4 & 5 P. & M. the King and Queen v. the Archbishop of Canterbury. —S. C.

cited 2 Rep. 92. b. in Bingham's case. —Goldb. 149. pl. 73. Hill. 43 Eliz. S. P. exactly, and seems to be S. C. Anon.

5. If there are lord and tenant in frankalmoigne, and the lord releases to the tenant all his right, the seigniority by this is extinct; and therefore quære, how the tenant shall hold over after. It seems as the lord held before the release made. Br. Tenures, pl. 74. cites 18 E. 2. and Fitzh. Release, 51.

6. If a man holds homage, fealty, rent, and castle-guard, and [the lord] grants the services, and the tenant attorns, the grantee shall not have the castle-guard; for he has not the castle. But per Berr. & Spigurnel, he shall have money for

for it, as contributory. *Quære inde*; for it seems, that that service is lost. Br. Tenures, pl. 58. cites 19 E. 2. & Fitzh. Assise, 399.

7. If lord, mesne, and tenant are, and mesne is attainted of felony, the lord shall have the services of the tenant which the mesne had, and no more; for the feignory is merged in the mesnalty; per Cand. but Tond. contra. And per Devon. the lord in chivalry may relinquish the ward, and distrain for the services, if he will; quod Tond. concessit. Br. Tenures, pl. 91. cites 1 E. 3. Fitzh. Avowry, 168.

8. The lord granted his rent, saving to him his feignory, the grantee cannot distrain; for it is rent-seck. Brooke says; and so see, that by express words fealty may be severed from rent-service. Br. Tenures, pl. 79. cites 7 E. 3. and Fitzh. Avowry, 142.

In such case the lord cannot make contribution to the suit, nor take contribution, and therefore

9. In cessavit it was agreed, that suit is not severable; so that if 3 tenants hold of the lord, and the part of the one comes to the lord, he shall not have any part of the suit; and the reason seems to be, inasmuch as he cannot take the suit, and be contributory to the suit which he himself takes. Br. Suit, pl. 1. cites 40 E. 3. 40.

the suit shall not be apportioned Br. Suit, pl. 5. cites 34 Ass. 15.

So if 3 hold by a borse, or other intire thing, and the lord recovers two parts of the land by cessavit, there the entire rent is extinct by the recovery; for this is the act of the lord. Br. Tenures, pl. 104. cites F. N. B. 209.

[224] 10. Confirmation with warranty therein, that an abbot shall hold *libere & quietus de gildis, placitis & querelis, actionibus & demandis ab omni servitio exactione seculari, &c. demandis* does not excuse him of corody; and because it is not expressly rehearsed in *perpetuam eleemosinam*, therefore they shall do other services; and such grant shall not discharge him from making bridges and causeways. Br. Tenures, pl. 6. cites 44 E. 3. 24.

Br. Extinction, pl. 13. cites S. C. for the suit was not extinct, but only suspended;

11. Where two parceners make partition of the manor, so that the one has the demesnes, and the other the manor, neither of them shall have the suit; but if the one dies without issue, the suit is revived. Br. Suit, pl. 3. cites 12 H. 4. 25.

quod nota. Brooke says, quære; for the manor was once defeated.

12. It was held, that by the unity of possession of the land in the lord, all customs and services annexed to the feignory, or to the lord, are extinct for ever, as heriot-custom, ancient mesne, fine for alienation, or custom to be bedel to the lord, or to collect his rents, &c. are extinct. But contra of custom, which runs with the land as gavel-kind, burgh-english, dowerment of the entire lands, &c. for this runs with the land, and there unity of possession in the lord, and after feoffment made to another, shall not change the custom; for it runs to a number, and throughout the country or vill, and not to the lord as a singular

singular person, as in the other cases before. Br. Avowry, pl. 46. cites 14 H. 4. 2.

13. If lord and tenant are, and the lord confirms the estate of the tenant *reddend' vel solvend' id. pro omnibus servitiis*, by this the tenure, which was before the confirmation, is determined. But if it had been *reservand' vel tenend'* by *id.* there the first tenure remains; per Brian Ch. J. But Brooke makes a quære thereof; for none made any answer thereto. Br. Tenures, pl. 40. cites 21 H. 4. 62. 73.

14. If there be lord, mesne, and tenant, and the lord releases to the tenant, &c. the mesnalty is extinct; for he has it only in respect of the charge which he brings to the lord, and by the release all this is determined. But per Littleton, tit. Rents in his book, if there be a *surplusage of rent*, the lord shall have it; quod nota. Br. Tenures, pl. 48. cites 8 H. 6. 24.

15. If the king grants land to J. S. in fee, to hold as freely as the king is in his crown, yet he shall hold of the king: and if he aliens without licence he shall make fine; for this is vested in the king by his prerogative, which cannot be extinct by such general words. Br. Tenures, pl. 52. cites 14 H. 6. 12.

16. If lord and tenant be of 3 acres of land, viz, *White-acre*, and 2 other acres, and the lord grants unto the tenant by deed, that he will not distrain in *White-acre* for his rent and services; this grant shall not enure to such intent to determine the feignory in any part, but shall enure by way of covenant; so that if the lord distrains in *White-acre* for his services, the tenant shall have an action of covenant. Perk. f. 69.

17. If lord and tenant are of 2 acres, and the lord releases unto the tenant all the right which he hath in the one acre of the same land, it is a determination of the whole feignory, Perk. f. 71. cites 7 E. 4. 25. 20 H. 6. Exting. 2.

And to this purpose there is a difference between a release in

fact, and a release in law: for if they purchase one of the acres in fee, which are holden of him, that is no determination but of the rate of the services, which are annual and severable, and he shall have the whole corporal service. But if the annual services be entire, as a horse, a hawk, &c. then all the annual services are gone by the purchase. But if one of the acres descend unto the lord, then if the annual services be entire he shall have the entire annual services out of the remnant of the tenancy. But if it was severable, as rent, &c. then it shall be apportioned according to the rate of the land. Perk. f. 71. cites 4 Aff. 5. 40 E. 4. 5. 40. 34 Aff. 15.

But if the lord disseise the tenant of part of the tenancy, the whole feignory is suspended; for a feignory shall not be suspended in part and in esse for other parcel to every intent simul & semel in one person, if not in special cases; but a feignory may be determined in part, and in esse for other part simul & semel, &c. Perk. f. 71. cites 19 E. 4. 1.

18. By feoffment made by the tenant unto one jointenant mesne, [242] there is but a moiety of the mesnalty extinct, viz. the moiety, which in right does belong unto the feoffee, and no more, &c. so as for one moiety of the tenancy there are lord, mesne, and tenant; and for the other moiety of the tenancy lord and tenant. Perk. f. 655.

19. Resolved, that the feignory and tenure of *chit*, or *chantery-land*, is extinct by possession of the king, by the act of 1 Ed. 6. notwithstanding the saving in the act, propter absurditatem. But

The saving to the donor, &c. all such rents, for

services,
&c. in the
statute 1 E.
6. cap. 14.
is controlled
by the com-

mon law, which adjudges it void as to the services, and the donor shall have the rent as rent-seck, distainable of common right; for it should be against right and reason, that the king should hold of, or do service to, any of his subjects. 8 Rep. 115. b. in Dr. Bonham's case, cites D. 313. 14 Eliz. and says, it was so adjudged. Mich. 16 & 17 Eliz. C. B. in Strowd's case.

for the rent-parcel of the tenure, the *lord may distrain the patentee* of the king. and make avowry upon the matter, but not upon the person within his fee and seigniority. D. 313. pl. 91. Trin. 14 Eliz. Anon.

20. *Abbot*, before the dissolution, *held of J. S. by fealty and rent*, and after the land came into the king's hands by the statute; the *seigniority is but suspended*; and if the king grants the land to another, the patentee shall hold of the lord as before, and the lord shall have his rent; but whether as rent-service as before, some doubted. D. 213. Marg. pl. 91. cites Trin. 23 Eliz. C. B.

21. *B. was lord, and D. was tenant of the manor of M. by knight-service. B. held the manor of M. of A. an abbot, as of his manor of L. which came to the crown by the statute of dissolutions.* Afterwards *B. purchased the manor of L. of the king*, and being so seised of both manors of L. and M. died seised. *C. son and heir of B. conveyed both manors to trustees to the use of himself and E. his wife for life, and to the heirs of C.* Afterwards *C. purchased the tenancy paravaile, and theretof enseoffed J. S.* Manwood held, that by B.'s purchase of L. being also seised of M. the seigniority between the abbot and B. was extinct, and that D. held of the manor of L. which was held over of the king in capite by knight service; then when C. enseoffed the trustees, and after purchased the tenancy, now the tenancy became parcel of the manors, and was held, as the manors were, of the king in capite; and when C. enseoffed J. S. he held as C. the feoffor held it before. Shute held, that before C. purchased the tenancy, D. held of C. and his wife; and though after the purchase of the tenancy by C. the tenancy presently became part of the manor held of the king, yet the seigniority is not merely extinct against the feme: for if C. dies leaving E. then J. S. shall hold of E. during life, there being no reason that the purchase of the baron should prejudice the wife. But if the uses had been limited before the marriage, then by the purchase of the tenancy a moiety of the seigniority had been extinct, and the baron should hold the other moiety of the feme, and when the marriage had taken effect, then this part is suspended. And to this Manwood and Clench agreed. Sav. 21. pl. 52. Pasch. 24 Eliz. in the Exchequer. Hutton's, or Gifford's case.

22. *A. held land of B. in M. as of his manor of N. by fealty, rent, and suit of court of the said manor. B. by deed indented and inrolled bargains, and sells to C. and his heirs all his tenements, rents, services, and hereditaments in M.* The *suit of court is extinguished.* 2 And. 5. pl. 3. Mich. 36 & 37 Eliz. Anthony v. Burton.

23. Where purchase of parcel of the land out of which, &c. by the lord shall extinguish the services, and what, see Heriot (H) pl. 2. •

(B. a. 2) Revived.

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1. 7 E. 4. 5. **E**NACTS, That lands holden of a common person by fealty, rent, or other service, coming to the king's hands by attainder of treason, and being afterwards granted by the king to another, shall be holden as if such attainder had not been; and that every person not attainted, his heirs, assigns, and successors in the same lands, &c. being in the hands of any other than the king, may distrain for the rent, as they might have done if the said attainders had not been. See (I) pl. 9 & 20.

2. If lord and tenant are, and the tenant is attainted of treason by act of parliament, and to forfeit all his lands, and after is pardoned and restored by another parliament, habendum to him and his heirs, as if no such attainder nor former act had been, now he shall hold of the common person as before, and yet at one time the tenure is extinct by the forfeiture of the land to the king. Br. Tenures, pl. 70. cites 31 H. 8.

3. If lands held of the king are given to the king in tail, the remainder over, the tenure so long as it is in the hands of the king is suspended; but after his death, without issue, it shall revive. D. 102. a. pl. 82. Trin. 1 Mar. the Queen v. Ld. Barkley.

(C. a) Services. In what Cases the Services shall be multiplied.

[1.] If a copyholder in fee holds by fealty, rent, suit of court, and to pay a heriot, that is to say, optimum animal upon every surrender, and after he surrenders parcel of the land he shall pay a heriot; for it cannot be divided, it being entire and a heriot service, and therefore shall be multiplied; for if he shall expect till all be surrendered, peradventure no heriot shall be paid, for then he may surrender all but a little parcel, and so no heriot shall be paid. Hill. 20 Ja. B. R. between SNAGG AND FOX by Dodd. and Chamb. But Houghton dubitavit.] Palm. 342. S. C. adjudged.

[2. If a man holds by homage, and dies having issue divers daughters, in this case the eldest daughter shall do homage for her and all her other sisters. Co. Litt. 67. b.]

[3. But in the said case if the coparceners make partition, then every one of them shall do homage, because it is not una sed diversa hæreditas. Co. Litt. 67. b.]

[4. So where there are 2 coparceners who hold by homage, and the one enfeoffs J. S. of his part; now J. S. shall do homage for his part; for it is a partition in law of this part. Co. Litt. 67. b.]

[5. [So] where there are divers coparceners, who hold by homage, and the eldest does homage for her and her other sisters, and after the youngest enfeoffs J. S. of her part; J. S. shall do homage for it; for by this the coparcenary is destroyed. Co. Litt. 67. b.]

[6. If there are several jointenants of land held by homage, they all shall do their homage jointly. Co. Litt. 67. b.]

[7. If there are several tenants in common of land held by homage, every of them shall do homage. Co. Litt. 67. b.]

[8. If tenant by homage makes feoffment of part of the land, the feoffee shall hold by homage. Co. Litt. 67. b.]

[244] And if several feoffees were of land, whereof one suit is due, the lord shall have only one suit, but this is where they are jointly infeoffed. Quære, if they are severally infeoffed, then it seems as Skipwith said, that the lord may distrain whom he pleases, and if the one makes the

9. In replevin the defendant shewed that certain land was held by suit of court and other services, &c. and alleged seisin, &c. and this descended to 2 coparceners who made partition, and the one of his part infeoffed the plaintiff, and the other of his part infeoffed J. N. and for suit arrear by 7 years he avowed upon the plaintiff, and the avowry good per Cur. quod nota. Now there shall be several avowries. And per Seton a man cannot make joint avowry upon several tenants, but by him after such partition and alienations if the one makes the suit, this shall discharge all the tenancy, and if any of the tenants make the suit, the other may plead it, but he may avow upon whom he pleases; quod non negatur. Nevertheless, quære in this case, if he shall not have suit of every of them? But per Skip. and Seton, he shall have it only of the one. Quod non negatur, quod nota bene. And the statute of Marlebridge, cap. 9. wills, that where coparceners hold by suit, he who has enitiam partem shall make the suit, and the others shall make contribution to him; and this is after partition. Quære before partition. Br. Suit, pl. 4. cites 24 E. 3. 73.

suit, the others shall have thereof advantage, and so the lord shall have but one suit; quod nota. And tit. Tenure, 64. and Bar in Fitzh. 211. every one shall make suit by himself. Br. Suit, pl. 4. cites 24 E. 3. 73.

10. If a man grants parcel of his rent service, and the tenant attorns, this is good, and he shall do two fealties if the service be fealty only. Br. Grants, pl. 4. cites 9 H. 6. 12.

Br. Avowry, pl. 110. cites S. C. ——— Br. Tenures, pl. 64. S. P. cites 29 H. 6. ——— Br. N. C. 29 H. 8. pl. 124. S. P.

11. If a man holds 3 acres by a hawk, and makes 3 several feoffments of the 3 acres, every feoffee shall hold by a hawk; for it is not severable. Contra of 3d. rent, or 3s. which is severable. Br. Tenures, pl. 42. cites 22 E. 4. 36.

12. If a man makes feoffment of a moiety of his land, the feoffee shall hold of the lord by the entire services by which the entire land was held before; for the statute *tenendo pro particula* does not hold place here for moiety nor part. Contra of one acre or two acres in certain. Contra of a third part, &c. which goes throughout the whole. Br. Tenures, pl. 64. cites 29 H. 8.

13. If there be lord and tenant of 3 acres of land by homage, fealty, suit of court, escuage, and the rent of a horse payable at the feast

feast of Easter, or by the rent of a *hawk* or of a *rose*, &c. and the *tenant* after the statute *enfeoffs one man of one acre* parcel of the tenancy, and another of another acre parcel of the tenancy, in this case every of them shall hold of the lord by homage, fealty, and suit; but the *escuage* shall be apportioned, and the relief, when it falls, as a rent severable, shall be apportioned, and the lord shall have but one horse, or one rose; or one hawk of them all, not apportionable. Perk. f. 684.

14. All *intire* services, whether things of *profit or pleasure*, as ox, &c. or falcon, dog, &c. shall be *multiplied by alienation* of part of the tenancy; but if the lord purchase parcel before any part aliened, all is extinct; but if after alienation, no more is extinct than remained on the parcel purchased. 8 Rep. 105. b. 106. Hill. 7 Jac. in Talbot's case.

15. *Some personal services* shall be multiplied, and some not, as homage and fealty is multiplied, and is not extinct by purchase of part by the lord, and so of knights service, and such services as are *pro bono publico & pro defensione regni*; but personal private services, as to be the lord's butler, carver, &c. or where the tenure is *ad convivandum dominum*, &c. *semel in anno*, &c. there shall be no apportionment or multiplication, and purchase of parcel by the lord shall extinguish such *private* personal services; but where such private personal services shall not be multiplied, the lord may *distrain every one* for not doing them, though they shall be done only by one of them. And manual labour, as to cut the lord's corn or grass, &c. which is to be done upon a certain thing, shall not multiply. 8 Rep. 105. b. Talbot's case.

10 Rep.
108. b. in
Lofield's
case.

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16. There is a *difference* between *very lord and very tenant*, and between *donor and donee*, or the *lessor and lessee*; for in case of very lord and very tenant, as well the annual as the casual *intire* services shall be multiplied, as appears in BRUERTON's case, 6 Rep. 1. b. 2. a. and in the 8 Rep. 105. in TALBOT's case. But in the case of donor and donee, or lessor or lessee, the entire rent reserved shall not by any division either of the reversion or of the possession, by act in law be multiplied. 10 Rep. 107. b. per Coke in Lofield's case.

17. If a man makes a *gift in tail of 2 acres* (one of the acres being *borough-english* land, and the other at *common law*) reserving a horse, he shall not multiply the horses, but shall pay one horse for which of them he will, but not 2 horses; per Coke Ch. J. 3 Bulst. 154. Mich. 13 Jac. in case of Moody v. Gar-nance.

(C. a. 2) Services abridged.

1. [If a man had given land before the statute *rendering 3d. pro omnibus servitiis salvo scutagio quum currit & absque homagio & fidelitate*, he should not have homage, though it be incident to the *escuage*; per Herle, Wilby, Bows, and Mutf. but several e contra. And if lord grants for him and his heirs to the tenant

and his heirs, that they shall never have ward nor marriage, the heir shall rebutt the lord in assise by this deed to claim ward; quod adjudicatur for law, per Herle. Br. Tenures, pl. 87. cites 19 E. 1. and Fitzh. Avowry, 224.

2. If there be lord and tenant, albeit the *lord confirms the estate, which the tenant has* in the tenements, yet the feignory remains entire to the lord as before. Litt. f. 535.

Because there is privity between the lord and his tenant; but if there be *lord, mesne, and tenant,*

3. If there be *lord and tenant, which tenant holds by fealty and 20s. rent,* if the lord by his deed *confirms the estate of the tenant to hold by 12d. or by a penny, or by a halfpenny,* in this case the tenant is discharged of all the other services, and shall render nothing to the lord but that which is comprized in the same confirmation. Litt. f. 538.

the lord cannot confirm the estate of the tenant to hold of him by less services; but it is void, because there is no privity between them, and a confirmation cannot make such an alteration of tenures. Co. Litt. 305. b. — But where there is lord, mesne, and tenant, and the *lord confirms the estate of the mesne to hold by less services,* this is good; for he is tenant in possession of the mesnalty, and there is no other possession. Br. Confirmation, pl. 8. cites 14 H. 4. 37. — And as there is required a privity when the lord abridges the services of his tenant by confirmation, so must there be also when he abridges them by release. And therefore the lord paramount cannot release to the tenant paravail, saving to him part of his services; but the saving in that case is void. Co. Litt. 305. b.

* As long as the state of the land continues, it cannot by the lord's confirmation be charged with any new service. Co. Litt. 305. a.

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4. If there be *lord, mesne, and tenant, and the tenant is an abbot that holds of the mesne by certain services yearly,* the which has no cause to have acquittance against his mesne for to bring a writ of mesne, &c. if the mesne *confirms the estate of the abbot in the land, to hold to him and his successors in frankalmoigne, &c.* this confirmation is good, and the abbot holds of the mesne in frankalmoigne, because *no * new service is reserved;* for all the services specially specified be extinct, and no rent is reserved to the mesne, but the abbot shall hold the land of him as before the confirmation; for he that holds in frankalmoigne ought to do no bodily service; so that *by such confirmation the mesne shall not reserve any new service,* but that the land shall be holden of him as it was before; and in this case the abbot shall have a writ of mesne, if he be distrained in his default, by force of the said confirmation, where percase he might not have such a writ before. Litt. f. 540.

And regularly where a confirmation does abridge services, there ought to be privity. Co. Litt. 305. b.

5. A man cannot abridge a *+ rent-charge or common of pasture* by a confirmation; but a *rent-service, in respect of the privity between the lord and the tenant,* may be abridged by a confirmation. Co. Litt. 305. a.

† But a man may release part of his *rent-charge or common, &c.* Co. Litt. 305.

6. A tenure may be abridged by a confirmation. Co. Litt. 305. a.

(D. a) * Relief.

[1. **B**EFORE the time of H. 1. the king and other lords used to make the heirs of their dead tenants to redeem their land. Janus Anglorum, 79.]

* Relevium is derived from the Latin word relevare; for so ancient authors say, and give

this reason, quia hereditas quæ jacens fuit per antecessoris decessum, relevatur in manus heredum, & propter factam relevationem facienda erit ab herede quedam præstatio, quæ dicitur relevium. And in Domesday it is called relevamentum & relevatio. Co. Litt. 76. a. — See Ld. Coke's Copyholder, 36. f. 25.

[2. But H. 1. abrogated this evil custom, and ordained [that] the heirs of the dead tenants of the king, and of other lords, relevarent terras de dominis suis, non redimerent. Janus Anglorum, 79. & 116. 70.]

What.

See (E. a) pl. 3.

[3. Relief is a profit of the seignior. 17 E. 3. 64. Co. 3. Pennant, 66.]

[4. Relief is not a service, but incident to the service. 4 E. 2 Avowry, 200. by Scrope. Co. 3. Pennant, 66.]

Fol. 515.

2 Inst. 95. S. P. — It is not any service, but a flower of the service, and shall go to the executors. Cro. J. 28. in the case of Mackworth v. Shipward. — It is only an improvement of, or an incident to the service. Co. Litt. 83. a.

5. It was said, that relief is only a thing personal. Br. Relief, pl. 11. cites 39 H. 6. 33.

6. The paying a relief is a putting the lord in seisin, and an acknowledging him for his lord; so as of ancient time, and in ancient books, relief is called simplex seifina. 2 Inst. 134.

7. Relief on alienation is not properly a relief, though called so in divers books; but is properly a fine for alienation. And this may be by tenure, by special reservation, by custom. Agreed per tot. Cur. Jo. 133. Trin. 2 Car. B. R. Hangerford v. Haviland.

(E. a) Relief. Of what Tenure or Service it is [247] to be paid. [And what it is, pl. 3. How much to be paid, pl. 2, 3, 4.]

[1. **H**E, who holds by petit serjeanty, shall not pay any relief. 28 E. 1. statute of wards and reliefs.]

[2. He, who holds in socage, shall not pay any relief, according to the proper signification of relief. 28 E. 1. statute of wards and reliefs. Ancient Tenures, fol. 3. b. But only shall double his rent; for anciently always it was put as a badge of knight Relief is an incident as well to chivalry as to socage; quod nota bene

Br. Te- knight service, ward, marriage, and relief. Bracton, lib. 2.
nures, pl. fol. 85. b. f. 8.]
76. cites
13 R. 2. and Fitzh. Avowry, 89.

The heir in socage shall double the rent; after the death of his father, in name of relief. Br. Relief, pl. 13. cites Vet. N. B. tit. Ravishment de Gard; and this appears tit. Socage in the Old Tenures, that the heir in socage shall not pay relief, but shall double his rent in name of relief.

[3. But of late time the doubling of the rent by tenant in socage, that is to say, the paying of so much as his rent is by one year over the rent, is called relief. Litt. 28. f. 126. Doctor Student, 14. b. 31 Aff. 15. Bract. lib. 2. fol. 85. b. f. 8. it is called *quadam præstatio ab hærede propter dominium & domini recognitionem*. Ancient Tenures, 3. b. says, that he shall double the rent. 13 E. 2. Avowry, 89. 20 E. 3. Avowry, 131. Britton, fol. 178. shall give this in acknowledgment of the seignior. Kello-way, incerti temporis, 136.]

If a man had been in-
feoffed before the statute of quia

[4. If tenant holds of the lord by fealty, and to pay 10s.* rent every 2 or 3 years, though it be not any annual rent, yet he shall pay 10s. for relief. Co. Litt. 91.]

emptores terrarum, to hold by 12 d. and fealty for all services, actions, and demands; yet he should pay relief; for this is incident to the tenure; per Skrene, ad quod non fuit responsum. Br. Relief, pl. 10. cites 14 H. 4. 8. — Br. Incidents, pl. 22. cites S. C. per Skrene; but Hank. contra, therefore quære inde.

Where the tenure is by fealty only, there is no relief due; for all other services except fealty are severable. Co. Litt. 93. a.

Br. Relief, pl. 5. cites Vet. Ten. S. C. — Ibid. pl. 8. cites 45 E. 3. 15. S. C. per Finch. — But if the annual value be abridged by express reddendo, there the grantee of the fee-farm shall pay relief. Mo. 168. pl. 301. in the case of Saffron Walden.

[5. A fee farmer shall not pay any relief; for the rent is intended the very value of the land, or the 4th part of it at least. 45 E. 3. 15. Ancient Tenures, fo. 4. b. because he ought not to do other thing, but so as is contained in the feoffment. Britt. fo. 61. Dubitatur Bracton, lib. 2. fol. 86. f. 9.]

[6. He who holds in *frankalmoigne* shall not pay any relief. Britt. fo. 61.]

[7.] [10. Of corporal service, or labour, or work of the tenant, no relief is due. Co. Litt. 91. b.]

But if the tenure be to attend on his lord at the feast of Christmas, or to pay

[8.] [11. As if the tenant in socage holds by service of attending upon his lord at Christmas, he shall not double this corporal service for relief. Co. Litt. 91. b. It seems because it is impossible to do this service double, being to be done by his own person at one and the same time.]

10 s. there the relief must be 10 s. because the other cannot be doubled, & sic de similibus. Co. Litt. 91. a.

[248] [9.] [12. But if a man holds in socage by service to do certain work-days at the lord's harvest, he shall double this corporal service for his relief, because the particular time of doing it is not prescribed, but only to be done in the harvest; the which may be done by his own person, or may be done by the labour of any other man.]

man. Autumn Vacation, 11 Car. So held by Master Herbert, reader of the Inner-Temple. Contra, Co. Litt. 91. b.]

[10.] [13. So it is when it is to plow the lord's land by certain days, or to work about a hedge by certain days, or such like.]

[11.] Abbot nor prior shall not render relief; for they do not come in by descent. But because the prior and the covent granted by their deed to the lord to hold in chivalry, and to render 100s. for relief at every avoidance of the prior, the lord distrained, and avowed for relief, as upon his very tenant, and the avowry awarded good. Brooke says, quod miror! Br. Tenures, pl. 77. cites 20 E. 3. and Fitzh. Avowry, 124.

[12.] Relief and heriot service are all in one and the same, condition, and the same law holds place in all cases. Per Frowike Ch. J. Kelw. 84. pl. 7. Pasch. 21 H. 7. Anon.

(F. a) Relief. How much shall be paid.

[1. **T**HE relief of knights, and all superiors, is the 4th part of their revenues. Co. 9. LOWE, 124. b. Co. Litt. 69. a. b. Co. 7. Nevill, 33. b.]

[2. An intire earldom shall pay 100l. for relief. Doct. Student, 14. Co. Litt. 69. a. b. 83. b. Magna Charta, cap. 2. Bracton, lib. 2. fo. 84. b. f. 2. Co. 7. NEVIL, 33. b. Selden, tit. Honor, 232.]

[3. An intire barony shall pay 100 marks for relief. Doctor Student, 14. Co. Litt. 69. a. b. 83. b. Co. 7. NEVIL, 33. b. Selden, tit. Honor, 232.]

[4. A marquisdome, which consists of the revenue of 2 baronies, which amounts to 800 marks, shall pay for relief 200 marks. Co. 9. LOWE, 124. * b. Co. Litt. 69. a. b. 83. Co. 7. NEVIL, 33. b. Selden, tit. Honor, 232.]

Fol. 516.

[5. A dukedom, which consists of the revenue of 2 earldoms, that is to say 800l. a year, shall pay 200l. for relief. Co. 9. LOWE, 124. b. Co. Litt. 69. a. b. 83. b. Co. 7. NEVIL, 33. b. Selden, tit. Honor, 232.]

[6. Quære, what relief the king of the Isle of Man, or Waight, shall pay. Co. Litt. 83. b. This is not limited by the statute of magna charta.]

[7. An intire knight's fee ought to pay 100s. Doctor Student, 14. Litt. 24. b. Co. 9. LOWE, 124. b. Gervasius de Tilbury, fol. 63. b. cap. de relevio. Co. Litt. 69.]

[8. And, pro rata, according to this value, if it be less. Litt. Co. Litt. 24. b.]

76. a. And this relief

was, as some hold, certain by the common law; but the relief of earls and barons were incertain, and therefore were called relevia rationabilia; but the statute of Magna Charta, cap. 2. limits them in certain, and mentions also a knight's fee.

A man may hold his land of his lord by the service of 2 knights fees, and then the heir, being of full age at the time of the death of his ancestor, shall pay to his lord 10 l. for relief. Co. Litt. 34. a.

[9. Tenant

S. C. at pl.
22.

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[9. Tenant by knight service, *by a custom*, may pay for an entire fee but 2 marks for relief. 40 E. 3. 9.]

[10. Upon the creation of a tenure any sum may be reserved, if more or less than the law appoints. 31 Aff. 15.]

[11. If a man be created an earl of a county, and that he shall have the 3d penny of the profits of the county, this is clearly such earl as shall pay 100l. for relief, within the statute of magna charta; for this was the ancient use of creation of earls. See Selden's Titles of Honor, 131.]

[12. [So] if a man be created an earl of a county, and that he shall have *pro tertio denario ejusdem comitatus, vel pro nomine ejusdem comitatus* 20l. or such sum, this is such earl as shall pay 100l. for relief, though he has but 20l. value, which was the body of his county; and the relief is according to the value of 400l. for the relief is not paid according to the true value, but according to the dignity of an earl. See Selden, tit. Honor, 131.]

[13. [So] if a man be created an earl of a county by letters patents, *et ulterius rex concedit to him* 20l. annuity, *ut honorem & dignitatem predictos honorificentius supportare valeat*, though this is not any part of the body of the earldom, but only an annuity for the supportation of his honour, yet he shall pay 100l. for his relief as an earl; for of late times the creations of earls have been made in this manner. Contra, Litt. 83. b.]

[14. [So] if the king creates J. S. earl of a county, and does not grant to him any land or annuity for the supportation of it, yet he shall pay 100l. for relief, because the relief is not to be paid according to the value of the county, but as earl. Contra, Co. Litt. 83. b.]

[15. If the king creates J. S. earl of a vill, or of a place within the county, yet he is such an earl as shall pay 100l. for relief.]

[16. If A. be a *feodal earl*, that is to say, holds his land as an earl, and he *aliens part of the land which is the body of the earldom*, he shall not pay 100l. for a relief for his earldom which remains; but his relief shall be abated according to the value of the land which is aliened. 10 H. 5. in the Exchequer, ex parte Rememoratoris, the which intratur 9 H. 5. Ibidem, this is admitted upon the pleading, where the earl of Devon pleaded such plea; and it was adjudged no plea, because he does not shew what persons had the lands so aliened, by which the king might have remedy against them for their reliefs.]

[17. If the king gives land in fee *absque aliquo inde reddendo*, this is a knight service in capite, because it is the best service general, that is to say, escuage for defence of the realm; but because it is not expressed in the reservation by what part of a fee he shall hold, and the law cannot make it an entire fee, or other part of a fee, according to the value, it seems that he shall pay the value of the land by a year, according to a *grand serjeanty*. Autumnal Reading, 1635. held so by Master Herbert, reader of the Inner-Temple.]

[18. So

[18. So it is, if the king gives land, and *does not express any tenure*, it shall be a tenure by knight service in capite; and because it cannot be made certain any way by what part of a knight's fee he shall hold it, it seems he shall pay for relief the value of the land by a year, having resemblance to a grand serjeanty; for relief is out of the statute of Magna Charta, c. there being no certain knight's fee, and then ought to be resorted to as was before the said statute.]

Fol. 517.

[19. *De serjeantiis vero nihil certum exprimitur, quid vel quantum dare debeant hæredes & ideo, juxta voluntatem dominorum dominis satisfaciant pro relevio, dum tamen ipsi domini rationem, vel mensuram non excedant.* Bracton, lib. 2. fol. 84. b. f. 7. Gervase of Tilbury, fol. 63. b. cap. de Relevio de Baronie. For grand serjeanty the value of the land for a year shall be paid for relief. * 11 H. 4. 72. b. by Cockain, Litt. 35. The value (over the charges and reprises).]

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* Br. Relief, pl. 2. cites S. C.

per Cockain Ch. B. ad quod non fuit responsum.—Br. Tenure, pl. 13. cites S. C. accordingly.

[20. In divers provinces by the feudal law there used, the rent of a year of the feud shall be given to the lord for relief; and in other provinces in other manner relief is given. Contii Methodus, 47.]

[21. By the law of England the tenant (in socage) ought to double the rent for relief, that is, he ought to pay for relief so much as the rent is by the year, and ought to pay his rent also. 16 H. 7. 4. b. Doctor and Student, 14. b. 28 E. 3. Statute of wards and relief. Bracton, lib. 2. fol. 85. b. f. 8. Litt. fo. 28. f. 126. Though the rent be payable at 4 or 5 terms of the year. Kell. incerti temporis, 136. 4 E. 2. Avowry, 200.]

[22. Tenant by knight service by a custom, may pay for an entire fee but 2 marks for relief. 40 E. 3. 9.]

S. C. at pl. 9.

23. It was agreed, and not denied, that where a lord avows for 100s. relief, where by custom of the country, or otherwise, he ought to have but 13s. 4d. there, if the lord has judgment to have return for 100s. the tenancy shall be charged with 100s. for relief for ever. Br. Estoppel, pl. 25. cites 40 E. 3. 9.

(G. a) Relief. Who shall pay.

[1. **H**E that ought to be in ward, if he had been within age at the death of his ancestor, shall pay relief, if he be of full age at his death. 17 E. 3. 64.]

If the king's tenant in chivalry dies, his heir of full

age, the heir shall sue primer seisin, and shall pay his relief. Contra of heir within age, and in ward of the king, and sue livery, he shall not pay relief. And the heir in socage, tenant of the king in chivalry, shall pay relief, and those shall find surety for their relief upon the suing out of the primer seisin. Br. Relief, pl. 12. cites F. N. B. 254. And says, see ibidem, 262. That where the tenant of the king in chivalry has issue two daughters, and dies, the one of full age, the other within age, the eldest shall sue livery for her moiety, and shall pay relief for her moiety, and the other shall be in ward quousque, &c.

[2. If

See (I. a)
Pl. 7.

[2. If the *tenant be disseised, and dies, his heir of full age, he shall pay relief; for he ought to be in ward if he had been within age.* 17 E. 3. 64.]

3. *Two coparceners; one dies, her heir of full age; she shall not pay a relief; for if she should pay any at all, she shall pay but the moiety, and that she cannot do; for a relief cannot be apportioned, for coparceners are but one tenant to the lord.* 3 Le. 13. pl. 30. Mich. 8 Eliz. C. B. Anon.

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(H. a) Who. *In respect of Estate.*

* Br. Relief, pl. 2.
cites S. C.

[1. *A Purchaser shall not pay relief, but only he who comes in by descent.* * 40 E. 3. 9. 11 H. 4. 74. b. 17 E. 3. 63. b.]

If the *tenant* *infeoffs* his heir *apparent* by *collusion* and *dies*, his heir of *full age*, it is a question in our books, whether he shall have relief either by the common law, or by the statute of Marlbridge, cap. 6. But now the statute of 13 Eliz. cap. 5. has cleared that question, and that the lord shall have relief where the conveyance is made to any person by collusion, &c. Co. Litt. 84. a.

[2. If the *tenant at common law* had *aliened in fee* to his *eldest son* and *died*, the son being of *full age*, he shall not pay relief; because he was in by purchase. Bracton, lib. 2. fol. 85. 17 E. 3. 64.]

[3. If the *tenant infeoffs his eldest son* and *dies*, the son being of *full age*, he shall pay relief though he be in by purchase, because he ought to be in ward, if he had been within age, by the statute of Marlborough (and it seems relief is within the equity of it, or otherwise it cannot be law). 17 E. 3. 63. b. 64. 7 E. 3. Relief, 11. Nevertheless Fitzherbert says, *credo quod non est lex.*]

[4. If the *tenant aliens in fee*, and *dies before notice* of the *feoffment to the lord*, his heir of *full age*, no relief shall be paid, because the heir is not his tenant; for the *privy of the avowry* is determined by the death of the alienor, for the heir shall not be in ward. Dubitatur, 17 E. 3. 64.]

† Fol. 518.

[5. If a *feme pays relief*, and *after takes baron*, and *has issue by him* and then † *dies*, the baron shall not pay new relief, because he does not succeed as heir. Bracton, lib. 2. fol. 84. b. f. 7.]

See (G. a)
pl. 1.—See
(I. a) pl. 7.

[6. A man shall not pay relief being of full age, but where, if he had been within age, he should be in ward, and e converso. 26 H. 8. 6. by Knightley said to be a ground.]

[7. A purchaser shall not pay the relief. 26 E. 3. 71. b. Bracton, lib. 2. fol. 84. b. f. 3. But only he who comes in by descent. Britton, fol. 177. b.]

[8. But, by the custom in Cornwall, the purchaser shall pay it. 14 H. 4. 5. b.]

S. P. But
if the corporation

[9. A corporation aggregate shall not pay relief, for it is a perpetual corporation. Co. Litt. 70. b.]

conveys over the lands to any natural man and his heirs, now relief, &c. and other incidents thereunto is due. And yet this possibility was remota potentia, but the reason is, cessante ratione legis cessat ipsa lex, and

and the reason of the immunity was in respect of the body politic, which by the conveyance ever ceases. Co. Litt. 70. b. ——— and says, it is the same of an abbot and his successors. Ibid.

[10. An abbot or prior who is in by succession shall not pay relief. 20 E. 3. Relief, 8. and Avowry, 124. 30 E. 3. Relief, 9. * 3 H. 4. 2. Because the corporation never dies. 3 E. 3. Relief, 9. Co. Litt. 99.]

* Br Relief, pl. 9. cites S. C. Every bishop in England hath a barony, and that barony is holden of the king in

[11. But by † prescription they may pay. 3 H. 4. 2. 8 R. 2. Itinere Cancii, title Relief, 14. Admitted by issue. 17 E. 3. 5. b. Co. Litt. 99.]

capite, and yet the king can have neither wardship or relief. Co. Litt. 70. b. ——— 2 Inst. 7. S. P. — And yet the successor of a bishop or abbot may pay relief by prescription or grant. Co. Litt. 84. a.

No relief if due upon succession unless it be by special reservation in point of tenure, or by custom also; agreed per tot. Cur. Jo. 133. Trin. 2 Car. B. R. Hungerford v. Haviland.

† S. P. per Thim. Ch. J. But not by the common law by the tenure. Br. Relief, pl. 9. cites 3 H. 4. 2. ——— See the note on pl. 9.

[12. If a tenant gives the land to his son and his feme in tail, [252] and dies, by which the reversion descends upon the son, though he has the estate tail by purchase, yet he shall pay relief for the reversion descended. 26 E. 3. 71. b. said to be adjudged by all the counsel.]

[13. But if the tenant aliens in fee upon condition to lease to himself for life, the remainder to his son in tail, the remainder to his own right heirs, and it is performed, and after he dies, his son shall not pay relief for the remainder descended, because he has the tail by purchase. 26 E. 3. 71. b. Dubitatur.]

But where land was given to the father for life, the remainder to the eldest

son in tail, the remainder to the right heirs of the father, and the father died, and after the son died without issue, and the youngest son entered; he was adjudged to pay relief as heir of his eldest brother, and not to be purchaser by the name of the right heir of the father. Br. Estoppel, pl. 25. cites 43 E. 3. 9.

[14. An heir female shall pay relief as well as the heir male. Doctor and Student, 14. b.]

[15. If land descends to an infant it being held in socage, he shall pay relief. Doctor and Student, 14. b.]

16. Grandfather, father, and son, the grandfather held by relief and died, the father entered and enfeoffed his son and dies; there the lord may distrain the son for the relief of his grandfather before he accepts him for his tenant, and shall make avowry for the same relief; contra if he first accepts the feoffee for his tenant; for upon an alienation the lord is not bound to change his avowry before he be satisfied of the arrears due before; and here the son is purchaser, but if he was in as heir and not as purchaser it had been otherwise. Br. Relief, pl. 7. cites 4 E. 3. 22.

17. If a man be seised of certain lands which is holden in socage, and makes a feoffment in fee to his own use, and dies seised of the use, (his heir of the age of 14 years or more,) and no will by him declared, the lord shall have relief of the heir; and this by the statute of 19 H. 7. cap. 15. Litt. L 126.

18. Relief is not due to the lord, but only from his very tenant in fee simple. Per Frowike Ch. J. Kelw. 82. pl. 2. Pasch. 21 H. 7. Anon.

(I. a) Relief. *To whom it shall be paid.*

S. P. Co. Litt. 83. b. [1. **I**F the king has the wardship of land held by others, by reason of his prerogative, yet the heir at full age shall pay relief to every of the common lords. * 24 E. 3. 24. b. 26 H. 8. 6. Bracton, lib. 2. fol. 85. f. 7. 39 E. 3. tit. Relief, 1. 13 H. 7. 15. Co. Litt. 83. b.]
because the king had the wardship of body and lands by his prerogative, and the lord upon every descent ought to have either wardship or relief.

* S. P. And per Hilliar, the other lords shall sue to the king by petition, and shall have their rents also. Brooke says, quære inde; for it seems that their seigniories are extinct. But see now the statute thereof, 2 E. 6. 8. Br. Relief, pl. 4. cites S. C.

S. P. But the king, or this lord who had the ward, shall not have relief also. But where a man holds of several common persons several lands in chivalry, and the one has the ward within age by priority, and the others have the ward of the land held of them, there none shall have relief; for every lord has the ward of land held of him. Br. Relief, pl. 13. cites Vet. N. B. tit. Ravishment de Gard.

See the note on pl. 7. [2. If an infant be in ward to J. S. his guardian in chivalry, he shall not pay relief to him at his full age.]

[253] [3. With this accords the law of Scotland. Skene, Regiam Majestatem, 68.]

[4. If there be lord, mesne, and tenant, and the tenant aliens, the mesne shall not have the relief. 14 H. 4. 5. b.]

Mo. 160. in the case of Saffron Walden.

[5. But by the custom in Gloucester, the lord shall have the relief upon alienation of the tenant. 14 H. 4. 5. b.]

[6. If the tenant dies, his heir within age, and the lord waives the ward, and takes him to his seignior, in this case the lord shall not have relief at his full age, because he might have had the ward of the body and land. Co. Litt. 83. b.]

See (G. 2) pl. 2.

[7. If the tenant be disseised, and the disseisor dies seised, and after the tenant dies, his heir within age, and after at full age he recovers the land of the heir of the disseisor, he shall pay relief; because he could not be in ward † till the recovery, because of the descent to the heir of the disseisor. Co. Litt. 83. b.]

† Fol. 519.

And though

in this case the tenant held two manors, and died seised of one, and the lord seised the body and lands of that manor, yet after recovery of the other manor by the heir at full age, the heir should pay relief for that manor; and so the same lord of the heir of the same tenant shall have both wardship during his minority, and relief at his full age. Co. Litt. 83. b.

8. Tenant for life should have relief, &c. 2 Inst. 234.

9. Relief is not any service, but a flower of the service, and shall go to the executor. Arg. Cro. J. 28. pl. 4. Pasch. 2 Jac. B. R. in case of Mackworth v. Shipward.

(K. a) Relief. What Thing shall be paid.
[Disjunctive.]

[1.] F tenant in socage holds to pay a pair of gilt spurs, or 5s. in money, at the feast of Easter, it is in the election of the tenant to pay which of them he will for relief; but if he does not pay when he ought, the lord may distrain for which of them he please. Co. Litt. 90. upon f. 126.]

[2. [But] if the tenant in socage be to attend upon his lord at Christmas, or to pay 10s. there the relief ought to be 10s. because the other cannot be doubled. Co. Litt. 91. upon f. 126.]

(L. a) Relief. At what Time it shall be paid.

[1.] F tenant in socage dies, his heir within age, he shall pay relief immediately, as well as if he had been of full age. 31 Aff. 15. by Tank.]

Br. Tenures, pl. 30. cites S. C.

[2. But if tenant by knight service dies, his heirs within age, he shall not pay relief before full age. 31 Aff. 15. Admitted.]

[3. After the death of the tenant in socage, relief is due immediately of what age soever the heir be, though he be not past the age of 14, because such lord cannot have the ward of the body, nor of the land of the heir. Litt. f. 127. Co. Litt. 91. where it is said that the said words in Litt. (so that he be past the age of 14 years) are not any part of Littleton, but added after thereto.]

[4. If the tenant in socage dies before the rent-day, yet the heir ought to pay the relief presently before the rent-day comes. 16 H. 7. 4. b. Littleton, f. 127.]

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[5. Properly this ought to be paid before the homage or any other service shall be received. 17 E. 3. 64.]

See (M. a) pl. 1.

[6. After receipt of homage, a man shall not avow for relief. 15 E. 3. Relief, 5. 16 E. 3. Relief, 10.]

See (M. a) pl. 1.

[7. If the tenant in socage holds by fealty and 10s. or a pair of gilt spurs, if the heir be not so soon as conveniently he may, all circumstances considered, after the death of his ancestor ready upon the land to pay his relief, the lord may distrain for which of them he will; for upon default of the tenant, the election is given to the lord. Co. Litt. 91.]

[8. If the tenant in socage holds by a bushel of wheat, he ought to pay it for relief presently after the death of his ancestor, and the lord is not bound to carry till harvest; for this is to be had at all times of the year. Co. Litt. 91. b. 92.]

[9. But if the tenant holds by a rose, or a bushel of roses to be paid at Midsummer, he is not bound to pay it for relief after the death of his ancestor till the time of the year comes for the growth of them; for the law does not compel him to do impos-

sible

sible things, nor to preserve them by art to other time than nature has ordained them. Co. Litt. 92.]

Fol. 520.

[10. But if tenant holds to pay certain *saffron*, he ought to pay it for relief presently after the death of his ancestor, before the time of growth, because it may naturally be preserved as well as corn, and it is to be had at all times of the year. Co. Litt. 92.]

11. It was held by Frowike and Kingsmil for clear law, that if I make a *lease for life*, the *remainder over in fee*, and after the tenant for life dies, yet the lord after his death shall not have relief, notwithstanding that his tenant be changed; but if he in remainder dies living the tenant for life, now by his death the right of a relief accrues to the lord, but it is not leviable during the life of tenant for life, because he is always tenant to his avowry, but immediately after the death of the tenant for life the lord may distrain for relief due by the death of him in the remainder. Keilw. 83. b. pl. 7. Pasch. 21 H. 7. Anon.

12. If lord and tenant are, and the tenant gives the land in tail, the remainder over in fee, and he in the remainder dies, and after the tenant in tail dies without heir of his body, quære if the lord shall have relief by reason of the death of him in the remainder, as well as if this remainder had been dependent upon a lease for term of life? It seems he shall not. Keilw. 84. a. pl. 7. Anon. And says, see like matter 11 H. 4. pl. 154. Scire Facias.

(M. a) Relief. What shall be a Bar of Relief.

See (L. a)
pl. 5, 6.

[1.] If the lord accepts homage of his tenant, he shall not have relief of himself after. 3 E. 2. Avowry, 190.]

2. A man gave in tail *pro homagio & servitio the donee reddend. 6d. pro omnibus servitiis*. Et per judicium Cur. By this the donee shall be discharged of homage and of relief; but the reporter says it is not law. Br. Tenures, pl. 76. cites 13 R. 2. and Fitzh. tit. Avowry, 89.—But Brook says, see ibidem, 99. Anno 19 E. 3. A man gave land *tenendum by 10s. pro omnibus servitiis, exactionibus, consuetud' & demand'* and yet the tenant was compelled to pay relief; for this is incident as well to chivalry as to socage; quod nota bene. Br. Tenures, pl. 76.

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3. It was said, that anno 18 E. 3. a man avowed for relief upon the heir in socage for double the rent, the heir pleaded *feoffment to hold by fealty and 10s. pro omnibus servitiis & demandis*, and yet judgment was against the heir, and that this should not discharge the relief; for it is not due nor in esse till the ancestor dies, and therefore was not in esse to be released. Br. Relief, pl. 6. cites 5 E. 4. 42.

Mo. 643.
S. C.—
Cro. E.
885. S. C.

4. Alienation of the land by the heir, and acceptance of the rent due after, is no bar to the lord of his relief due on death of the ancestor. 2 And. 178. Mich. 43 & 44 Eliz. Parkham v. Norton.

(N. a) Relief. Remedy for Recovery thereof.
Actions, &c. and Pleadings.

1. **I**T was said, that relief is only a thing personal, and yet where there are lord, mesne, and tenant, and the *tenant* is *distrained* by the lord *for the relief of the mesne*, he shall have writ of mesne against the mesne to discharge him thereof. Br. Relief, pl. 11. cites 39 H. 6. 31.

2. *And*, per Rolf, 7 H. 6. 13. if the relief be due to the lord, he *shall* * [not] *have action of debt* thereof; but if he dies, his *executors* shall have thereof action of debt against the tenant; *quod non negatur*. Br. Relief, pl. 11.

* All the editions of Brooke are mis-printed, by leaving out the

word (not). For the Year-book is express, that the lord *shall not* have writ of debt thereof, because it is parcel of his seignior, which is a franktenement in him. 7 H. 6. 13. pl. 34.

The lord may † *distrain*, but he cannot have debt for it; but his executor or administrator may have debt, but † cannot *distrain* for it. Co. Litt. 83. a. b. — Co. Litt. 162. b. S. P. because it is no rent, but a casual improvement.

† 4 Rep. 49. b. cites 7 H. 6. 13. 22 Ass. pl. 52.

‡ Arg. D. 140. pl. 37.

a Le. 179. Trin. 30 Eliz. B. R. in LORD NORTH'S CASE, some were of opinion, that debt lies for relief; for there is a contract by fealty. — And 2 Roll. Rep. 371. Doderidge J. held clearly, that debt lies for relief by the lord himself; and that so are all the books in the time of E. 1. throughout the law almost, and cites Fitzh. tit. Distress, in time of E. 1. And the reason is, because it is not a service, but a casual profit and duty, by reason of the service, though it be in the realty.

¶ S. P. per Holt Ch. J. Show. 36. Trin. 1 W. & M. in case of SHUTTLEWORTH v. GARRET because they have no other remedy. — They may have debt for it by the common law. Co. Litt. 162. b.

3. *And* Brooke says, see 32 H. 8. Ro. 528. in C. B. debt was brought by executors of the lord, of relief due to the testator. And the defendant pleaded in bar, and traversed the tenure, and so to issue; and therefore it seems clearly, that debt lies for the executors. Br. Relief, pl. 11.

4. The statute of 32 H. 8. of *avowries*, extends only to rent suit, or service, so as relief is not within the purview of the law, because it is no service, but a duty, by reason of the tenure or service. 2 Inst. 95.

5. A. the grandfather died seised, leaving B. his son (the father of C. the defendant) at age. B. made C. his executor, and died. O. S. as executor of an executor, brought debt against C. for relief. It was agreed by the court, 1st, That an executor may have an action of debt for relief by the common law, without fealty 32 H. 8. and that *seisin of the services need not be alleged*, when the executor brings § debt for relief: *otherwise when the party himself avows*. 2d, That *debt may be brought* for it in a foreign county, and the defendant cannot plead *nil debet*; for relief is made certain by the statute of Magna Charta, cap. 2. 3dly, That *debt well lies against an executor* for relief; the *testator could not wage his law* for that, because it is certain, and a real duty. Also in the case of relief, there was a *real contract* in the creation of the tenure. Poph. said, that in debt, for relief, the *plaintiff ought to shew the tenure in special*, and by what part of a

Cro. E. 883. pl. 17. Pasch. 44 Eliz. B. R. Lord St. John v. Brandring. S. C. adjudged for the plaintiff. § [256]

knight's fee the tenure is, that the Court may judge what is due for relief. And judgment was given for the lord St. John, and after error was brought; but the judgment was affirmed. Noy, 43. Oliver St. John v. Bawdrip.

Per Whitlock J.

Lat. 95.

S. C. —

Lat. 130.

per Whit-

6. If relief be due *by tenure*, then *distress* is incident; but if *by custom*, no distress lies, unless especial custom warrants it. Jo. 133. Trin. 2 Car. B. R. Hungerford and Haviland ——— cites 11 Rep. 44. Bullen v. Godfrey.

lock J. S. P.

(O. a) Tenures taken away.

Mr. Madox in his History of the Exchequer, p. 432, 433. makes the following observations on this statute. He

1. 12 Car. 2. ENACTS, That all tenures by knights service of the king, or of any other person, and by knights service in capite, and by socage in capite of the king, and the fruits thereof, shall be taken away. And all tenures of any honours, manors, lands, tenements, or hereditaments, held either of the king or of any other person, shall be turned in free and common socage.

says, it is wonderful to see how much the notion of tenancy in capite, which is in itself plain and simple, has been obscured and perplexed by writers within the memory of man. There have been eager disputes about the tenants in capite. By what I have read of the controversy, I cannot perceive that it was ever agreed amongst the disputants, what tenancy in capite was; or that they had a distinct notion of it. There is one thing here to be remembered, which may justly seem strange. I must speak of it with great submission. It was intended, by the above statute, to take away and abolish tenure by knight-service, whether of a king or of a subject, with the fruits and appendages thereof, viz. wardship, marriage, relief, escuage, &c. and to take away wardship, marriage, relief, escuage, and other feodal profits or services incident either to tenure by barony, or by serjeanty. But there are some clauses in that statute relating to tenures, which, if I do not mistake, are worded in terms so complex and indistinct, that, like a two-edged sword, they cut both ways. In general, as to the nature of tenancy in capite, one may presume to say, it has not been sufficiently cleared by the common lawyers, or even the antiquaries of our nation. Sir Edward Coke has no luck in the explication he gives of it in his first Inst. p. 108. a. Nor is his opinion in the case needful to be recited here. Mr. Selden speaks as if he thought a baron and a tenant in capite was all one. (Not. & Sp. cil. & Eadm. p. * 868 & tit. Hon. p. 575.) And Sir Henry Spelman says, that in the time of king Hen. 2. every tenure in capite was accounted a tenure by barony. (Glossar. ad vocem Baro. p. 73. col. 2.) In this case, both Mr. Selden and Sir H. Spelman, although in part they are not far from the truth, have fallen short of giving a clear and just explication. I think it may be rightly said, that in the ancient times (suppose about the time of king Hen. the 2d) most of the tenants holding of the king in capite, were real or reputed barons; not barely because they held of the king in capite, but partly for that reason, and chiefly because they held of him large seigniories. And there was, as I take it, so great a likeness between a baron and one of the king's tenants in capite, who held a large seignior, that in the reign of king H. 2. they made little or no difference between them. There was also another thing which made tenancy by barony, and tenancy of the king in capite, by knight-service, so like the one to the other; and that was the undetermined quantity or number of knight's fees necessary to compose a barony. For whereas some baronies or honours were excessive large, consisting of a very great number of fees; others again were so small, that by the quantity of them, or the number of the fees whereof they consisted, they could not be known to be baronies. In some, every baron, properly so called, was a tenant in capite; but every tenant in capite was not, by reason of his tenure in capite, a baron, or reputed baron. From the reign of king Henry 3. downwards to the succeeding times, the tenants in capite became very numerous; so that it sometimes happened that a man was the king's tenant in capite of a half, or a quarter, or a 10th part of a knight's fee, which small tenancies in capite were far different from baronies. Again, if a man held of the king in capite by some other tenure than barony or chivalry, such person, although he was a tenant in capite, was by no means a baron. Men seem to have been led into their confused way of speaking upon this subject, by supposing tenure in capite to have been a distinct kind of tenure, in like manner as tenure by knight's service, socage, and others were, which supposition is fallacious and untrue. For tenure in capite was so far from being a distinct sort of tenure by itself, that it might be predicated of the several other tenures, that is to say, a man might hold of the king in capite, either by barony or by knight service, or by serjeanty, or by socage, or by fee farm. And if it be said that a man held of the king in capite, without mentioning expressly by what service, it is to be understood, that he held of the king immediately, in opposition to his holding

holding immediately of another; and that phrase was used in such case, when the service was not in question, but the tenure only, to wit, whether it was *mediate or immediate*. But the fallacious supposition above-mentioned had entered into the minds of men long before the reign of king Charles 2d. For example: Queen Elizabeth by her letters patent, dated at Westminster the 19th of November, in the 42d year of her reign, granted to RICHARD RYVES AND JOHN BURGESS, gentlemen, the manor or lordship of Borscombe in Wiltshire, and divers other lands in fee-simple; the tenure was reserved in these words: *Tenendum de nobis, hæredibus & successoribus nostris, ut de manerio nostro de East-Greenwich, in comitatu nostro Kancia, per fidelitatem tantum in libero & communi socagio, & non in capite, nec per servitium militare, pro omnibus aliis redditibus, servitiis, &c.* (To be held of us, our heirs and successors, as of our manor of East-Greenwich, in the county of Kent, by fealty only, in free and common socage, and not in capite, nor by military service, for all other rents and services.) Ex. 8. parte orig. 42 Eliz. Rot. 1. The same queen, by letters patent, dated the 14th day of March, in the same 42d year, granted to Sir John Spencer, in fee-simple, the site of the priory of Tortington in Suffex, &c. *Tenendum de nobis, &c.* in the same words as above in the grant to Ryves. Ib. Rot. 10. And many other letters patent, made in the reign of that queen, and afterwards, are of the same tenure; whereas the latter words (*& non in capite*) are (with great submission) repugnant to the former, *tenendum de nobis*. And therefore the tenure (if any) reserved to the crown by those patents, was in truth, *tenure in capite by socage*. — Dr. Brady, in his Glossary, verbo *Tenentes in capite de rege*, says, that besides the tenants in capite by military service, and such as were bound to military service in and by their tenure in *serjeanty*, there were small tenants in capite by *petit serjeanty*.

* Misprinted for 168.

For more of *Tenure* in general, see *Abowry, Distress, Guardian, Helne, Prerogative*, and other proper titles.

(A) Term-Time.

1. *ASSUMPSIT*, &c. and declared of a promise made 5 June, to pay money in Trinity term next ensuing, and averred, that the next Trinity term after the said promise began the 7 June, 30 Eliz. and ended on the 26 day of the same month, and that the defendant had not paid. Defendant pleaded non-assumpsit. The plaintiff had a verdict. It was moved in arrest of judgment, that the *essoign-day* of the said Trinity term was the 3 of June, 30 Eliz. and so the term in which the promise is to be performed must be Trinity Term in 31 Eliz. and so the action is brought too soon. But some of the Court held, that the plaintiff ought to have judgment; for according to common intent, it is not term until full term; and therefore, when the promise was made between the *essoign-day* and the common day of appearance in court, the common people look upon the term to be when the judges sit in court; but others e contra. But however they gave judgment for the plaintiff; for 3 judges held, that when the defendant pleaded non-assumpsit, he had agreed, that there was such a term as the plaintiff had alleged, though, in truth, it commenced before the promise; for the

Le. 210.
Pl. 295.
S. C. 1193,
that Anderson was of opinion that the plaintiff must wait the performance of the promise a year longer, but that the other 3 J. held strongly the contrary, by reason of the common intendment, and that so it is usually set down in the almanack; and

says, that afterwards judgment was given for the plaintiff, but does not mention the

*defendant should have set it forth in his plea, or have given evidence of the truth of this matter to the jury, which not having done, the Court is not bound to inquire the truth thereof, any farther than any other * matter in fact not appearing to them.* And. 240. pl. 256. Pasch. 32 Eliz. Bishop v. Harecourt.

particular reason of such judgment. — Cro. E. 210. pl. 6. S. C. and that the other 3 justices held contra to Anderson, because the plaintiff had expressly alleged, that the term began 7 June, and the defendant had no denied it, and the court ex officio are not to search the rolls of the court, &c. but admitting they ought so to do, and though in law the *essoign-day* is the first day of the term, and writs may be returned then, yet in common speech that is the first day when the court sits; and Anderson against his own opinion gave judgment for the plaintiff. — 5 Rep. 37. a. S. C. but S. P. does not appear.

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† S. P. Godb. 33. in case of Har- ley v. Reynolds. —

2. The † whole *term* is but as *one day*, and all the judgments in B. R. are entered as upon the 1st day of the term. Per Cur. 3 Bulst. 114. Mich. 13 Jac. Anon.

S. P. 5 Rep. 74. in Wymark's case. — Though to some purposes the term is but as one day in law, yet to other purposes it is not so. As, for instance, if there be continuances, there can be no judgment before they are entered. Arg. and admitted by the Court. 8 Mod. 190. Mich. 10 Geo. in case of Miller v. Bradley.

3. *Midsummer-day* was on a Wednesday, and if that had not been, that Wednesday had been the *last day of Trinity term*, but now it was on a Tuesday; for, per Holt Ch. J. Trinity term may begin, but cannot end on Midsummer-day, and in such a year there can be no return in *tres septiman' Trin.* But it must be *Die Jovis post tres septiman' Trin.* And this, he said, had not happened in 100 years before. Farr. 17. Pasch. 1 Annæ, B. R. Anon.

4. Though the *next day after the last day of the term* be not, in strictness, part of the term, and therefore (as Mr. Vernon insisted) could not be a day to make any motion on the petty bag side, yet as to other purposes it is part; and therefore a motion then made, to *dismiss a bill for want of prosecution*, on a certificate from the fix clerk, that no prosecution had been within 3 terms, of which the last term was one, was denied by the Master of the Rolls. Wms.'s Rep. 522. Mich. 1718. Anon.

And in a note added by the editor at the end of page 523. it is said that the like determination was made by Ld. C. King in 1730.

5. So where the *last seal continued 3 mornings*, and computing the 3d morning according to the day of the month, it would be a proper time to move to make a report absolute, viz. it would then be above 8 days after service, it was held by the Master of the Rolls, that the *report cannot as yet be made absolute*; for though this seal lasts 3 days, yet it is *all a continuance only of the first day*, and so the time not yet out. Wms.'s Rep. 522. pl. 147. Mich. 1718. Anon. cites Hill. Vacation, 1721.

For more of Term-Time in general, see *Executions, Judgments, Cesse*, and other proper titles.

Testatum.

(A) Good.

1. **I** F I *recover goods* by action brought in Middlesex, I may, upon a testatum, have a *capias* into any foreign county. Per Williams. 2 Le. 67. pl. 90. in Noon's case.

2. Testatum is grounded upon a former return filed, that the party has nothing in the county where the action is brought. Yelv. 179. Trin. 8 Jac. in case of Goodier v. Junce, cites 18 H. 6. 27. and 2 H 6. 9.

3. A *ca. sa.* was awarded with a testatum, where *no capias* had been awarded before, and for that reason it was reversed. Cro. J. 246. in case of Goodyere v. Ince, says a precedent was cited between Jones and

4. An *action* was brought by *original*, and judgment was had the *last paper day* of Trinity term. It was objected, that this judgment could not be signed till after the *quarto die post*, &c. of the present Michaelmas term, and therefore a *testatum ca. sa.* being brought in this Michaelmas term must be irregular; because there could be no *ca. sa.* on a judgment not signed, and consequently nothing to ground a testatum *ca. sa.* upon, especially this action being brought by *original*. But it was answered, that when the judgment was signed, though in the latter end of Trinity term, this, by relation, is a sufficient foundation to sue out a *capias* the first day of Michaelmas term, which will be a warrant to found a testatum returnable *tres Trin.* and so good. Per Cur. this, by relation, is a judgment of the first day of the term in which it was obtained, which is sufficient to ground a *ca. sa.* and consequently a testatum *ca. sa.* And if there is no difference between an action by bill and by *original*, it is regular: but if continuances had been entered, no execution could be prior to such entry. 8 Mod. 189, 190. Mich. 10 Geo. B. R. in error on a judgment in C. B. Miller v. Bradley.

5. In an action of *covenant* arising in London, a *testatum capias* issued to the county palatine of Durham, and a copy thereof having been served on the defendant, the Court was moved to stay proceedings; and counsel being heard on both sides, the Court gave their opinions *seriatim*, that the testatum *capias* to the bishop was not the process that the defendant should be served with, pursuant to the *stat. 12 Geo. 1. cap. 29.* but that the *capias* which the bishop issues, is the proper process

process wherewith he should have been served, and upon which he would have been arrested, if this act had not been made, and the act has not altered the law in that particular; and thereupon the Court stayed the proceedings which had been had on the service of the testatum capias. Rep. of Pract. in C. B. 38. Mich. 1 Geo. 2. Beake & al. v. Smith Ar.

6. A *capias* in *Middlesex*, and a *testatum capias* may be sued out both together. Arg. Barnard. Rep. in B. R. 392. Mich. 3 Geo. 2. in the case of PORTER v. JONES, it was said to have been settled about 3 years ago in the case of Stone v. Stone.

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7. A motion was made in Easter term 1735, to stay proceedings on a *testatum capias*, a copy of which had been served on the defendant in the county palatine of Lancaster, without taking out of a mandate thereon from the chancellor of the county palatine; and a rule to shew cause being granted, the Court upon hearing counsel held, that the process was well served, and pursuant to the statute of 5 Geo. 2. cap. 27. and therefore the rule to shew cause was discharged. Rep. of Pract. in C. B. 119, 120. Trin. 8 & 9 Geo. 2. Byer v. Whitaker and others.

(B) Necessary. In what Cases.

Brownl. 207. S. C. but it is not there said that no such writ issued, but that the sheriffs of London made no such return. —Yelv.

179. Good- yere v. Junce.

1. A *N-elegit* issued into the county of Lancaster, which mentioned another *elegit* issued before into London, and returned *nihil*, and upon the *testatum* it was commanded to extend all the goods and land, &c. But in truth, no writ was awarded before into London. This was held to be a manifest error by reason of the *testatum*, whereas without a *testatum* the plaintiff that recovered might have had an *elegit* into as many counties as he had pleased. Cro. J. 246. pl. 4. Trin. 8 Jac. in the Exchequer. Goodyere v. Ince.

—2 Brownl. 208. S.C. that no writ issued to the sheriff of London.

2. A man is outlawed in *Middlesex*, a *capias utlagatum* may be sued out against him into any other county without a *testatum*. Vent. 33. Trin. 21 Car. 2. B. R. in a nota there.

3. A. brought debt in London and had judgment and sued out a *fiery facias* directed to the sheriff without a *testatum* *fiery facias* into London, by virtue whereof the defendant's goods were taken in execution in *Middlesex*, and for this reason the judgment was set aside as irregular. 8 Mod. 282. Trin. 10 Geo. 1725. Goddard v. Gilman.

4. So where an action was brought in the county of S. and upon judgment for the plaintiff he took out a *fiery facias* directed to the sheriff of W. without a *testatum*; execution was set aside. 8 Mod. 282. cites Mich. 1725. White v. Cornwall.

5. A *scire facias* was sued out into *Middlesex* against the defendant as bail, and a *fiery facias* issued to the sheriff of that county,

county, who returned *nulla bona*, then a common *fieri facias* was executed in London, without mentioning it to be a *testatum*. And the Court held it good, and said, there was no occasion to insert the form of a *testatum* in the writ, in order that the writ itself might shew it was a *testatum*; and that if it had been necessary they would have given leave to amend. Rep. of Pract. in C. B. 79. Mich. 6 Geo. 2. Oades v. Forrest.

(C) Return thereof.

1. **O**N a judgment in Staffordshire, the plaintiff sued out a *fi. fa.* with a *testatum* into Worcestershire. It was moved that this ought to be set aside, because no *fi. fa.* had ever gone into Staffordshire, and the sheriff of Staffordshire made affidavit that he never returned any *fi. fa.* in the cause. Sed non allocatur for the *fi. fa.* upon which the *testatum* is founded, is returned of course by the attornies themselves, as originals are; if you search the file you may find one, and that is sufficient. 2 Salk. 589. pl. 2. Mich. 7 W. 3. B. R. Palmet v. Price.

2. Executors brought 2 *scire facias*'s of the same teste, but [261] different returns, the one tested October 22, returnable November 14. the 2d returnable November 23. So by rule of Court defendant had 4 days from the return of the 2d *scire facias* to plead, which indeed was all that remained of the term. Defendant did not plead. Plaintiff takes out a *fi. fa.* returnable the same last day, to warrant a *testatum*. And per Cur. it was well; for though defendant has 4 days to plead after the return of the 2d *scire facias*, yet that is in favour to him when he does not plead; the judgment is of the day of return of the 2d *sci. fa.* and he may take out a *fi. fa.* after to warrant the *testatum*; and the secondary remembered a case where a *fi. fa.* was returnable before judgment affirmed was held good in favour of execution, to warrant a *testatum*. Far. 138. Hill. 1 Ann. B. R. Austin v. Crisby.

For more of *Testatum* in general, see *Ball, Debassabit, Executions, Teste*, and other proper titles.

Testatum Existit.

(A) Pleadings by Testatum Existit. Good or not.

2 Roll. Rep. 110. BUTTIFANT V. HOLMAN, S. C. And it was said Arg. that it was resolved Mich. 31 & 32 Elis. that such pleading as here is good, because the feoffment is pleaded only by way of inducement of

1. **I**N covenant the plaintiff declared, *quod cum per indenturam testatum existit, that the defendant infeoffed the plaintiff of such lands, and therein covenanted to save him harmless from all dowers and incumbrances, which he had not done, &c.* Upon a demurrer to this declaration the plaintiff had judgment. Upon error brought it was assigned, that the declaration was ill, because it did not expressly allege that the defendant made a feoffment to him, but only by a *quod cum testatum existit*, which is only a recital; but all the Court resolved the contrary, and that the difference is where it is by way of declaration, and where by way of bar or replication; for in the declaration *testatum existit* is sufficient to induce the action, and to assign the breach; and the judgment was affirmed. Cro. J. 537. pl. 2. Trin. 17 Jac. B. R. Buttivant v. Holman.

the action, because this action is only to recover damages; and that in the New Book of Entries are 3 precedents, where *quod testatum est* was pleaded, as in our case, and held a good plea. 1st, Upon a bargain and sale, *testatum est quod targarizavit*. 2dly, Upon demise of a lease for years, viz. *testatum est quod dimisit*, the case of which record is reported in 9 Rep. 8. BRADSHAW'S case. 3dly, Of a grant of an annuity, viz. *testatum est per indenturam quod concessit*. And Doderidge J. said, if there was any difference between those cases and the case at bar, it is, that in those cases the grant took effect by the deed only, whereas in the principal case, a further act is to be executed, viz. livery of seisin, but it seems that there is no diversity; for though nothing passed by the feoffment by reason of its insufficiency, yet the feoffee has good cause to have action of covenant, and since the covenant is in the same deed by which the land was conveyed, he may as well have it as he may plead the other, *quod Crooke and Haughton J. concesserunt*; and the judgment was affirmed, absente Mountague Ch. J. — Jenk. 331. pl. 63. S. C. and takes notice of the difference where the pleading is by way of bar or replication, according to Cro. J. as above.

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2 Lev. 11. HOLBECH V. BENNET, S. C. and the same exception taken by Hale Ch. J. but adjournatur. — 2 Keb. 825. pl. 45. S. C. says, that the avowry

2. In *replevin*, &c. the defendant avowed for that the place where, &c. was parcel of the manor of F. &c. and that time out of mind the mayor, &c. of Coventry, and one Millon and others were seised in fee thereof; and being so seised by indenture made between them of one part, and one Bassnet of the other part *testatum existit*, that the said corporation and the natural persons had demised the said manor to the said Bassnet, &c. Hale Ch. J. said, and the same was agreed to per Cur. that this plea was ill, because the avowant had not laid the lease in Bassnet by an express averment in fact, but only by a *testatum existit*, which is not good

good pleading. 2 Saund. 317. 319. Pasch. 23 Car. 2. Bennet and Holbech's case. being ill, judgment was affirmed in the Exchequer-chamber.

3. Debt was brought upon an indenture of *charter-party* not made between parties, in which there was a covenant with the plaintiff, who was a stranger to the indenture, and no party thereto; and the plaintiff declared by testatum existit. And the Court were all of opinion, that the declaration by testatum existit is good, though it be in debt, and not in covenant, and brought by him alone to whom the debt is due; and gave judgment for the plaintiff. 2 Lev. 74. Hill. 24 & 25 Car. 2. B. R. Cooker v. Child. 3 Keb. 94. pl. 40. 115. pl. 23. COCKER V. CHILD, S. C. And per Cur. It is well enough here in debt, as on articles, though testatum

existit in debt on demise is ill. And afterwards judgment was given for the plaintiff. S. C. cited Lutw. 535. Trin. 5 W. & M. in the case of BOSWAL V. RAWSTERNE; and the difference was there taken, that where action of debt is brought on covenant to pay money, it is good by way of testatum existit; but where it is upon a demise reserving rent, it is not good; and thereupon an exception that such declaration by testatum, &c. was not good in debt, was over ruled.

4. In covenant the plaintiff declared, that he was seised in fee, and that by indenture made between the plaintiff and Eliz. his wife of the one part, and the defendant of the other part, testatum existit that the plaintiff and his wife demised. It was objected, that it being shewn that the husband was sole seised, the husband and wife could not demise; sed non allocatur; for it is not affirmed, but only that by the indenture it is witnessed; for the testatum is a rehearsal of that. 2 Salk. 515. pl. 2. Pasch. 2 W. & M. B. R. Woodward v. Cliffe.

For more of Testatum Existit in general, see Covenant, and other proper titles.

* **Teste.**

* The teste
is the war-
rant of the
writ. Cro.
E. 592. pl.
31. Mich.
39 & 40
Eliz. C. B.
Grondy v.
Ischam.

(A) What *Time* there ought to be *between* the *Teste*
and Return of Writs.

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1. **I**N assise, the justices saw by the teste of the patent that it was brought within the 15 days before the assise; and therefore they would not take the assise. Br. Assise, pl. 316. cites 30 Ass. 44.

2. 13 Car. 2. stat. 2. cap. 2. In all personal actions and actions of ejectione firmæ by original writ in B. R. or C. B. after issue joined and judgment had, there shall not need to be 15 days betwixt the teste and return of any venire facias, habeas corpus jur. or distr. jur. fieri facias, or ca. sa. other than cap. ad sat. whereon a writ of exigent after judgment is to be awarded and cap. ad sat. against the defendant, in order to make a bail liable.

This act shall not extend to popular actions, except debt upon 2 E. 6. of tithes.

12 Mod.
451. S. C.
accordingly.
—LdRaym.
Rep. 671.
S. C. ac-
cordingly.

3. In writ of appeal of murder there ought to be 15 days between the teste and return, but the want thereof is cured by appearance and pleading in chief. 1 Salk. 63. pl. 4. Pasch. 13 W. 3. B. R. Wilmot v. Tiler.

4. It was resolved, it was not necessary to have 15 days return of process in a franchise; for the reason of them in the court of Westminster is, because that time is judged necessary for people to come from the remote parts to which the process of those courts does extend, which does not hold in franchises. 12 Mod. 524. Trin. 13 W. 3. B. R. Bidolph v. Veal.

5. One was outlawed for murder and brought error, and the outlawry was reversed, and the defendant committed to Newgate to undergo his trial next sessions; and Holt Ch. J. said, that to try the defendant in B. R. there must be a venire facias returnable at the common day, and 15 days between the teste and return of it. 12 Mod. 544. Trin. 13 W. 3. and 562. Mich. 13 W. 3. the King v. Young.

6. Defendant had obtained a rule for plaintiff to shew cause why writ of *capias ad respondendum* should not be quashed, there not being 15 days between the teste and return thereof. The rule was discharged, this being matter of error, and not of

of irregularity. Barnes's Notes in C. B. 295. Trin. 10 G. 2. Williams v. Faulkner.

7. *Attachment of privilege* bore teste 23d, returnable Jan. 31. Defendant moved to quash the writ for want of 15 days between the teste and return, and a rule was made to shew cause, which was afterwards made absolute, the Court considering the attachment of privilege *in the nature of an original writ*. Barnes's Notes in C. B. 297, 298. Trin. 11 & 12 G. 2. Haward, Attorney, v. Dinison.

The reporter makes a quere whether this might not have been taken advantage of by plea in abate-

ment, or by writ of error. Ibid.

Rep. of Pract. in C. B. 149. S. C. and the prothonotaries said, they did not know that the practice required 15 days, but usually there were 8, and sometimes 4. The Court observed, that then nothing seems settled by the practice, and said, that the common law requires 15 days between the teste and return of all writs; and if the practice has not settled it otherwise, the law ought to prevail in this as well as in other cases; and so the rule was made absolute.

(B) Good or not. And where it shall be said to be prior to the Cause of Action.

1. **I**F the tenant in assise or *precipe* quod reddat aliens the day of the teste of the writ, yet the writ is good, and shall not abate; for this day is all the day of the plaint in law; quod nota. Br. Jours, pl. 44. cites 17 Aff. 21.

Br. Briefs, pl. 279. cites S. C.

2. In *formedon* the tenant may appear at the first day, and may abate this writ; and new writ may be brought bearing date *mesne* between the 1st day and the 4th day, and therefore it shall not abate. Br. Jours, pl. 33. cites 24 E. 3. 24.

Br. Journe Accounts, pl. 17. cites S. C.

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3. In *scire facias* the prayee in aid cast *protection* bearing date the 7th day of January, to continue for a year, and after the plaintiff brought *re-garnishment*, bearing date the 8th day of Jan. then next after, *scilicet*, the last day of the year, and well, per Finch. for a man may bring a new writ the same day that his writ abates, quere, for by 4 H. 6. 7. a man may bring writ the same day that the disseisin was made. Br. Brief, pl. 40. cites 40 E. 3. 18.

Br. Jours, pl. 12. cites S. C.

4. And yet the teste of the writ to some respects shall serve for all the day, for alienation such a day or jointenancy this day shall not abate the writ, for the writ shall have relation to all this day that it bore teste; and therefore it is pending the writ. Br. Brief, pl. 40. cites 40 E. 3. 18.

5. Note per Catesby J. That if the *recordare* bears date before the plaint affirmed, or if *mittimus* bears date before the fine came into the Chancery, or if writ of error bears date before judgment, or if indictment be taken after the teste of the *certiorari* which comes to remove it; yet if those are removed the courts to which they are removed shall hold plea. And so it is put in use at this day of writ of error, for all are the courts of the king; and yet the writ of error is *si judicium inde redditum sit*. And therefore see that the first court, to which

which it comes, needs not to send the record till the judgment be given; but if they send it, then the higher court may proceed upon it. Contra often in court baron. Br. Cause de Remover, &c. pl. 32. cites 1 R. 2. 4.

Br. Brief, pl. 446. cites S. C. — And per Weston if a joint scoffment be made the same day

that the writ of assise bears teste, and the tenant pleads jointenancy by deed bearing date the same day, the jointenancy is void; for this shall be taken to be done pending the writ; for all the day is the day of the writ; but Strange and Martin e contra, and otherwise it shall be mischief; for the disseisor may make several alienations the same day, &c. and therefore judgment was for the plaintiff; quære if the cause was not in as much as the day in their verdict of the disseisin is not material. Br. Jours, pl. 34. cites 4 H. 6. 7.

7. Upon *trespass or robbery*, the party may have action bearing date the same day; quod instanti die fecit transgr. &c. Br. Jours, pl. 34. cites 4 H. 6. 7. per Rolf.

8 Mod. 344. PERRY v. KIRK. Hill. 11 Geo. 1. The plaintiff in assumpsit

counted of a promissory note, upon producing whereof it appeared the defendant was to have 6 weeks from the date thereof to pay the money, but within the six weeks he was arrested on a latitat, whereupon it was insisted that the action was not maintainable. But it was answered, that the declaration was above 6 weeks after date of the note, and that is all that the Court ought to take notice of. For the original process was only to bring the defendant in custodia mareschalli, which may well be before the cause of action. The Court held that to be the constant difference, for the plaintiff may sue out a latitat before the cause of action, but he cannot declare till after the cause of action does arise.

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2 Jo. 149, 150. S. C. and that there is veritas legis and veritas facti, and that the declaration is according to the truth of the fact, and the teste of the writ must necessarily be in the term,

9. In case, the plaintiff declared, that the defendant took out a latitat 21 Januarii 32 Car. 2. ac etiam billæ, &c. whereas he owed him nothing. Upon not guilty, a special verdict was found that the latitat was teste 28 Novembris 32 Car. 2. but was really taken out 21 Januarii 32 Car. 2. Pemberton Ch. J. said, the course of the Court is to teste latitats taken out in the vacation, as of the term preceding; and the * course of the Court is the law of a court; he might have declared, that the defendant sued out a latitat the 21st Jan. teste the 28 Nov. preceding, and if he be not estopped to declare so, surely the jury may find the whole matter; and so judgment was given pro quer'. 1 Vent. 362, 363. Hill. 33 & 34 Car. 2. in B. R. Walburgh v. Saltonstall.

though the writ be prosecuted after. — Skin. 32. S. C. adjudged, and that it was said that if he had pleaded it as taken out 21 Jan. teste 28 Nov. it would have been unquestionably good, and that so it should be now, the course being known.

Original process may bear date out of term, because it issues out of Chancery, which is always open; but judicial process issues out of those other courts which are open only in term-time, and therefore must bear date in term; per Doderidge J. Lat. 11. in case of Ramsey v. Mitchell. — 118. S. C.

10. In debt for rent, the defendant pleaded an eviction by elegit, teste 15 July; and adjudged 5 Will. & Mar. that the elegit was void; for the Court will take notice that it was tested out of term. Ex relatione M^ri place. Ld. Raym. Rep. 4. Pasch. 6 W. & M. C. B. Ball v. Rowe.

In debt on a bail-bond, it appeared by the declaration, that the writ was sued out

in the long vacation, out of term-time, and exception was taken; for that the Court must judicially take notice of the beginning and end of the terms, as well moveable as immoveable; and that the 18th of July was after Trinity term was ended, and therefore that the writ was a void writ, for it was not possible to be sued out of the court of B. R. then sitting at Westminster the 18th of July, when it was vacation-time, no such court being then sitting at Westminster. And the writ being void, the arrest was illegal, and the bail-bond thereupon given void also; the Court being unanimous of opinion, that it was ill, and that it was not according to the truth of the fact, for it could not on the 18th of July be sued out of the court of B. R. then sitting at Westminster, when the Court did not, nor could not, sit out of term. The plaintiff desired leave to discontinue, which was granted him May 13, 1729. 2 Lord Raym. Rep. 1557, 1558. East. 2 Geo. 2. B. R. Usher Estwick v. Edward Cooke.

11. It was moved to refer the regularity of a judgment in debt; the declaration was of Hillary term, and judgment by confession, which was signed after the term; and after the signing, viz. the 10th of April, the defendant died, and the execution before teste the 23d of January; and it was insisted that it appeared that the execution was before the judgment. Sed non allocatur; for execution may be sued out after the death of the defendant, except against a purchaser, and the writ of execution may bear teste of the precedent term, even of the first day of that term. Comyns's Rep. 117. pl. 82. Pasch. 13 W. 3. Parsons v. Gill.

1 Salk. 50. pl. 13. Mich. 2 Ann. B. R. S. C. but S. P. does not appear. — Ld. Raym. Rep. 695. S. C. says the motion was denied; for per Cur. The practice is always so, and well enough.

12. An action being limited to be brought within a year, the plaintiff gave instructions for an original to the curfitor some days before the end of the year, but the writ was not sealed till after the year, though antedated as of the day of the instructions given; and upon debate whether this was good or not, Ld. C. Parker referred it to the principals and assistants of the Society of Curfitors, who certified that it was the constant practice of the office to teste original writs against hundreds, corporations, heirs, and in several other cases, the same day the writs are bespoke; and that they never knew it otherwise, or that the practice was ever contested before the present case; and his lordship decreed accordingly. Wms.'s Rep. 437, 438. Trin. 1718. Price v. Chewton Hundred in Somersetshire.

13. The *capias* ad respondendum was directed to the sheriff (singular) of London, tested the 13th of February, which was the day after the end of last Hillary term. It was moved to quash it, alleging defendant has no other remedy to take advantage thereof, because he cannot haveoyer of the writ; nor will it appear upon the record in case of a writ of error. A rule was to shew cause, which was afterwards made absolute. This writ bearing teste in vacation is void. Barnes's Notes in C. B. 291, 292. East. 7 G. 2. Bennet v. Sampson.

Rep. of Pract. in C. B. 99. S. C. accordingly.

(C) In whose Name.

1. **I** F the king dies in the morning, all procefs and patents shall be in his name all this day, and not in the name of the new king; per Ellerker & Fulth. Br. Jours, pl. 34. cites 4 H. 6. 7.

2. The Lord Chief Justice of the King's Bench died about 11 in the morning, and all the writs which were sealed that day, bore teste in his name, and all those which were sealed the next day, bore teste in the name of the second justice of the King's Bench. Cro. C. 393. pl. 3. Hill. 10 Car. a memorandum.

For more of Teste in general, see Executions, Testatum, and other proper titles.

Time.

(A) Time. Day. In what Cases the Day shall be taken exclusive.

* S. C. cited Arg. 3 Lev. 438. in case of Hatter v. Ash.

[1. **I** F a man leases for years, habendum from the sealing and delivery of the deed, the day is not excluded, but it shall commence presently after the delivery. H. 32 El. B. R. between HIGHAM AND COLE. Dubitatur. Co. 5. * CLAYTON, 1 Co. Litt. 46. b.]

Hob. 140. pl. 190. in case of Norris v. the Hundred of Gawtry.

[2. So if it had been extunc, or from the making, it shall commence presently. Co. Litt. 46. b. Hobart's Reports, 188.]

5 Rep. 1. Mich. 27 & 28 Eliz. B. R. Clayton's case. Mo. 879. said by Hobart to have been so adjudged.

[3. But if a lease be made, habendum from the day of the date, or from the day of the making, the day shall be taken exclusive. Co. Litt. 46. b.]

Roll. Rep. 387, 388.

S. C. Do- deridge said nothing, but all the others agreed that the day shall be exclusive.

[4. **But** if a man leases for years, habendum from the date, the day of the date shall be taken exclusive. Tr. 14 Ja. B. R. between BACON AND WALLER adjudged per Curiam. Co. Litt. 46. b.]

3 Bulst. 204. S. C.

But

But Trin. 8 W. 3. C. B. it was adjudged by 3 judges against Treby Ch. J. that such habendum includes the day of the date. 2 Salk. 417. pl. 1. Hatts v. Ash. — 3 Lev. 438. S. C. by the name of HATTER v. ASH, and was of a lease made by a prebendary for life habendum a datu; and adjudged accordingly by Nevil, Powel senior & junior, Treby Ch. J. being now e contra, though himself at first was of the same opinion, but changed it, and was not present when the judgment was given, but, as it was supposed, absented himself purposely; and note also, that Powel junior was at first of opinion for the plaintiff, but afterwards changed it, and was of opinion for the defendant, such variety and change had there been in this case. — Ld. Raym. Rep. 84. S. C. and there it was urged, that though Co. Litt. 46. is objected to the contrary, yet that book is founded upon 5 Rep. 1. b. CLAYTON'S CASE, * where this point is not resolved by the Court, but inferred by the reporter of the case from Popham in Dyer, 218. which book does not warrant any such opinion. And though 3 Bulst. 203. Bacon v. Waller, Mo. 40. pl. 128. agrees with 5 Rep. 1. yet Cro. J. 135. Osborne v. Rider, and 258. Luellin v. Williams, are contrary. And for these and other reasons, the said 3 justices held the lease good, and gave judgment accordingly.

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[5. If A. makes an obligation to B. dated 1 May, and B. the obligee after makes release to A. dated the same day, of all actions till the day of the release, this shall not release the obligation. Du-bitatur. H. 3 Ja. B.]

Trespass was done in the morning, and the same day at noon a release was

made of all trespasses; afterwards on the same day another trespass was done. In trespass brought for a trespass generally done on that day, the defendant might plead generally the release given on that day, and then the plaintiff in his replication must divide the day, to shew that the trespass was done after the release in that day. Moor, 596. pl. 812. Trin. 33 Eliz. in case of Plaine v. Bynd.

[6. In case of a protection, the year shall be accounted from the day of the date, excluding the day of the date. Hobart's Reports, 188.]

Hob. 139. pl. 190. in case of Norris v. the hundred of

Gawtry. — Mo. 879. pl. 1233. in S. C.

[7. A deed of bargain and sale may be inrolled within six months after the day of the date, excluding the day of the date. Hobart's Reports, 188.]

Roll. Rep. 387. Arg. in case of WALLER v. BACON,

cites D. 5 Eliz. POPHAM'S CASE; and the reporter says nota, it has been resolved also, that if it be inrolled the same day on which it bears date, it is good.

[8. An action to be brought upon the statute of hue and cry upon a robbery, ought to be brought within a year after the robbery done, including the day upon which it was done. Hobart's Reports, 188. NORRIS AND HUNDRED OF GAUTRIS; for it is an act, not a date.]

Hob. 139, 140. pl. 190. Hill. 14 Jac. S. C. — Mo. 878. pl. 1233. S. C. —

Brownl. 156. S. C. accordingly.

[9. If a man leases for years, rendering rent for one whole year, viz. a festo Sancti Michaelis † usque ad finem termini pradieti; in this case the rent shall be due on the feast-day itself; for the premises of the reservation are || generally, rendering rent, for one entire year, which is from the time of the reservation, and therefore the feast is not excluded. And when he goes further, and says, viz. a festo Sancti Michaelis, these words are void, inasmuch as they are repugnant to the premises. Pasch. 43 El. B. R. per Curiam, between UMBLE AND FISHER.]

Cro. E. 7c2. S. C. but there the

|| Fol. 521.

declaration was held to be ill, and judgment for the defendant. —

† Though in pleadings usque tale festum will exclude that day; yet, in case of a reservation, it is to be governed by the intent. Vent. 292. Hill. 27 & 28 Car. 2. B. R. Pigg v. Bridges.

[10. If a man in debt for rent declares, that 25th March, 15 Jac. he leased certain land to the defendant, habendum abinde, for a year, rendering so much rent half-yearly at the feast of St. Michael, and the annunciation, by equal portions, during the term. For the said rent, due at the said 2 feasts, he brings the action; and moved in arrest of judgment, that the lease commenced the 25th day of March, and so all this day is taken inclusive; and then the lease ended the day before the next 25th day of March, and so the rent reserved after the term ended, and therefore no action lies for it. But resolved, that by the word abinde, the 25th day of March being before mentioned, the said 25th day shall be taken exclusive, and so the rent reserved within the term. Mich. 2 Car. between BENEDICT, HALL, AND DEWE. Adjudged.]

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* The day as for payment of money determines at sun-set.

But for making arbitrament, &c.

continues till 10 and 11 o'clock at night.

2 And. 38, 39. pl. 25. Arg. in case of Eanester v. Truffel.

[11. If the condition of an obligation be to stand to the award of J. S. Ita quod fiat upon or before the first day of &c.

and an award is made upon the said first day of between 6 and 7 o'clock, *post occasum solis*. 'This is a good award within the condition; for if it be within the natural day it is sufficient, and not like to the * payment of money to bind men to attend it. P. 11 Car. B. R. between CHURCH AND GREENWOOD. Adjudged per Curiam, upon a special verdict. Intratur Mich. 10 Rot. 497. Note, That Master Hodgson, an attorney of Staple's Inn, shewed afterwards to me a precedent of Mich. 18 & 19 El. B. between RAVEN AND LYTWIN, adjudged accordingly, upon a special verdict, per Curiam, because they said that the day to this purpose has continuance till *midnight*.]

Cro. E. 218. pl. 5. S. C. adjudged for the plaintiff; but it does not appear that any exception was taken thereto this point, or that the Court took any notice of it. —

Le. 22c. pl. 303. S. C. but nothing said as to this point. — But Cro. E. 301. pl. 16. Bynde v. Plaine, S. C. affirmed in error, where this very matter was assigned for error.

3 Bulst. 204. in S. C. says, as to this point the whole Court agreed in opinion, according to the judgment given in Lucilin's case, that the same is all one. —

13. *Habendum a datu*, and *a die datus*, are all one. Roll. Rep. 387. in case of BACON v. WALLER. Arg. cites it to have been adjudged, Mich. 8 Jac. in the case of LUELLING v. MORGAN. But Serjeant Athow and Moore seemed e contra. But Crook and Haughton thought them all one; but Coke was not then present; and the Court said, they would see the record of that case.

— Bulst. 177. Trin. 9 Jac. Anon. *Flaming Ch. J. hold*

held a die datus to be exclusive, but that a datu was inclusive of the day. And he took this difference, where it is in a case and point of interest, that is conveyed or passed from one to another, as in case of a lease for years, or any other interest that is passed; and so is CLAYTON's case, Coke, 5. pa. fol. 1. But where it is in matters of account, where no matter of interest is to be passed or conveyed, as if one be to be accountable to another, and that by deed, be the same to be done, a die datus, or a datu, in this case no interest passing by the deed, be the same a die datus, or a datu, it is all one, and no difference between them; as was clearly held by Flemming Ch. J. and so agreed by the Court.

S. C. and same difference cited Arg. Lord Raym. Rep. 85. Trin. 8 W. 3. in case of Hatter v. Ash. And of this opinion was Powel sen. but the others said nothing.

14. If a submission be *to an award, so as it be made within 6 days after the submission*, an award made on the same day on which the submission was, is good; because the day of the award shall be taken inclusive, and not exclusive; per Roll Ch. J. Stile, 382. Trin. 1653. B. R. Clark's case.

S. C. cited
2 Lutw.
1593. by
the reporter
in a nota, in
the case of
Bellasis v. Hester?

15. Insurance of H.'s life for a year. H. died on the last day. The insurer is liable. 2 Salk. 625. pl. 3. Trin. 11 W. 3. B. R. at the sittings at Guildhall, Sir Robert Howard's case.

12 Mod.
256. S. C.
— Lord
Raym. Rep.
480. S. C.

16. When the computation is to be made from an act done, the day in which the act was done must be included; because since there is no fraction in a day, that act relates to the first moment of the day in which it was done, and was as if it were then done. But when the computation is to be from the day itself, and not from an act done, there the day in which the act was done must be excluded by express words of the parties. As if a lease be made to commence a die datus, the day is excluded; but if it be a confectio, which is an act done, the day of the making shall be included. Per Powell & Nevil J. Contra Treby: Ld. Raym. Rep. 281. Mich. 9 Will. 3. in case of Bellasis v. Hester, cites CLAYTON's case. And Treby Ch. J. admitted that case to be good law.

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17. The law will never account by minutes or hours to make priorities in a single day, unless it be to prevent a great mischief or inconvenience; as if a bond be made the 1st day of January, and this bond is released the same day, the bond may be averred to be made before the release. So if a feme sole binds herself in a bond, and the same day marries, one may aver, that she married after the bond delivered. In assise it appears, that the disseisin was done the same day on which the writ was teste; yet this shall not abate the writ, because the assise might be purchased after the disseisin; per Cur. Ld. Raym. Rep. 281. Mich. 9 W. 3. in case of Bellasis v. Hester.

18. A was born Feb. 1. at 11 at night; and January 31, at 1 in the morning, A. makes a will of lands, and dies. It is a good will, for he was then of age; said, per Holt Ch. J. to have been so adjudged. 1 Salk. 414. Mich. 3 Annæ, B. R. Anon.

S. C. cited
by Holt Ch.
J. 2 Salk.
625. pl. 3.
Trin. 11 W.
3. at the

strings at Guildhall, in Sir Robert Howard's case. — S. C. cited by Holt. Lord Raym. Rep. 480. in S. C. — And in 2 Ld. Raym. Rep. 1096. Mich. 3 Annæ, in case of Fitzhugh v. Denington.

(A. 2.) Day. *How to be computed.*

1. **W**HERE the king dies one day, and another king is made the same day, this day shall be the day of the old king; quod quære; for otherwise it was computed in 1 E. 6. and if he mistakes his day, this shall be at his peril in mortmain. But it is said that it was not greatly argued by the Court, nor adjudged. Br. Jours, pl. 49. cites 7 H. 7. 5.

2. *Citra festum Sancti Johannis*; per Frowike Ch. J. The feast in our law commences in the morning, and ends at night, and the natural day begins ad ortum solis, and ends ad occasum solis, and so is taken and adjudged in our law; but the feast, by the law of the church, commences at noon in the vigil, and continues till the next day at midnight; and the night as to burglary commences ad occasum solis, and continues ad ortum solis Keilw. 75. Mich. 21 H. 7.

3. There is no fraction of a day but in special cases, and then the day of payment, (viz. of a bill of exchange payable one day after sight,) shall commence after midnight, and from this time he shall have an intire complete day, consisting of 24 hours, to pay the bill; for a day to this purpose commences always at midnight, and always consists of 24 hours; per Treby Ch. J. 2 Lutw. 1593. in case of Bellasis v. Hester.

(A. 3) Where there shall be a *Priority and Posteriority*, as to Things done on the same Day.

1. **I**F a man brings assise, and the tenant aliens the same day that the assise is purchased, yet the writ is good; for this day is adjudged in law all the day of the plea; quod nota. Br. Brief, pl. 275. cites 17 Aff. 21.

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S. C. cited
Arg. 2 Lutw.
1592. in
case of Bel-
lasis v. Hes-
ter.

2. In false imprisonment the defendant justified, for that on the 29th Sept. he was chosen mayor of Lynn, and that a plaint was levied in the court there against the plaintiff, for which he was committed by the mayor to the gaol there. Upon demurrer it was objected, that the defendant did not answer to the time of the day before he was chosen mayor; for the commitment might be the same day before he was chosen mayor; but adjudged for the defendant; for the justification shall be intended for the whole day, and if the commitment was before he was mayor, the plaintiff ought to shew it. Cro. Eliz. 168. pl. 4. Hill. 32 Eliz. B. R. Smith v. Hellier and Clerke.

3 Bulst. 222.
Mich. 14
Jac. S. C.
— Roll.
Rep. 413.
pl. 1. S. C.

3. A. became indebted to B. for wares, and in consideration thereof postea eodem die promised to pay it; and such declaration was ruled good, not as a promise in law, but as an actual promise raised upon a consideration continuing; which shews that
little

little distance of time (though the same day) *alters the intendment of the law*; cited per Roll. Allen, 70. as 14 Jac. the case of Hodge v. Vavafor.

4. If a writ abates one day, and another writ is purchased which bears teste the same day, it shall be intended after the abatement of the first. Allen, 34. Mich. 23 Car. B. R. in case of the Earl of Northumberland v. Green.

5. Error was brought to reverse a judgment in an action for words, and assigns for error, that the *plaint* was entered the same day that the words were spoken, which was said ought not to be, because the action should be brought after the words spoken, which shall not be intended to be, if it be the same day; for the law admits of no fractions of time, which will be if the day be divided into several parts, as it here must be, for there must be one hour supposed when the words were spoken, and another hour when the plaint was entered. But Roll Just. said, it was well enough, and ordered the plaintiff to take her judgment nisi causa, before the end of the term. Sty. 72. Mich. 23 Car. Symons v. Low.

6. If 2 informations are preferred the same day, which refer to the first day of the term, yet it may be examined which of them was first preferred. Per Levins of counsel. Arg. 2 Lutw. 1591. in the case of Bellasis v. Hester.

the sheriff the same day, there is a prius & posterius, and though that which was first delivered was tested after the other, yet it shall be preferred. Otherwise the sheriff is liable. 12 Mod. 147. Smallcomb v. Buckingham.——1 Salk. 320. pl. 4. S. C.——S. C. cited Arg. 6 Mod. 292. by the name of Smallcombe v. Crosse.

7. There is no *division of a day, unless in case of necessity, as in Co. Litt. 135. and 6 Rep. 33. b. where there was a priority of an instant. Arg. 5 Mod. 377. in case of Smallcomb v. Buckingham.

sey.——Yelv. 87. S. P. and in general intendment, what is done in one day is done at the same time. In case of Dorrington v. East.

So in case of an execution, as where 2 fieri facias's are delivered to

1 Salk. 320. S. C. * S. P. Arg. Sty. 119. in case of Cornish v. Cow-

(B) Year. How it shall be accounted.

1. **P**ER statutum de anno bissextili editum, 21 H. 3. it is ordained that to avoid the doubt which has been made, computetur dies excrefcens in anno bissextili in ipso anno, & sic habeatur de mense illo in quo excrefcit & contineatur dies ille excrefcens in integritate anni prædicti & deputentur dies ille & dies proximo præcedens pro unico die.

2. If a condition be that if a rent be arrear at Mich. by a quarter of a year after, it shall be lawful to re-enter, the quarter of a year shall be accounted by the days of the year, which is, that 91 days make a quarter, and for the 6 hours over, the law has not any regard. D. 17, 18 El. 345. 5.]

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X 3

3. Decla-

3. Declaration in debt for rent *pro reditu unius anni finiti a festo Mich. primo ad festum anno secundo Caroli*, after verdict judgment was arrested, because this cannot be a year, being between the feasts. Palm. 531. Pasch. 4 Car. B. R. Bligh v. Trefrey.

Cro. J. 166.
pl. 6. Trin.
5 Jac. B. R.
Bishop of
Peterbo-
rough v.
Catesby,
S. P.—
2 Show.
206. pl. 215.
Trin. 34
Car. 2. B. R.
the King v.
Spiller. S. P.

4. Where *time* mentioned in any statute is expressed by the year, half year, or quarter of a year, it is always computed in law by solar months, viz. 12 calendar months for a year; but where months are mentioned in a statute and not years, those are always computed by the moon, viz. 4 weeks to the month. And so the statute against deer stealing, appointing the prosecution to be within 12 months after the fact, and 12 lunar months being expired before any prosecution; the conviction was quashed for the reason. Carth. 407. Trin. 9 W. 3. B. R. in case of the King v. Peckham,

5. It was moved to set aside an execution for irregularity, upon suggestion, that when he confessed the judgment, the plaintiff and he agreed, that execution should not be taken out till a year after; the plaintiff insisted that he had staid a year; for the warrant was in a long vacation, and the judgment was entered as of Trin. term before, and the execution was after Trin. term following; and so the plaintiff had waited a year after judgment entered. But the Court was not agreed, whether in such case the year was to be reckoned from the date of the judgment, or of the warrant. 6 Mod. 14. Mich. 2 Annæ B. R. Dillon v. Brown.

See (B) pl.
4.—Rent
(X. 2)

(C) Month. How the Month shall be computed.

A month in
statutes,
which are
only direc-
tory of a pu-

[1. *I*N all statutes where mention is of a month, 28 days shall be intended the legal computation. Trin. 5 Ja. B. R. CATESBY's case, per Curiam agreed.]

nishment for an offence, which was at common law, is not a penal statute; and in that case the month shall be computed according to the calendar, and not 28 days. Sid. 186. Pasch. 16 Car. 2. B. R. on stat. 13 H. 4. 7. of riots. King v. Cuffens & al. — See Cro. E. 835. pl. 6. Trin. 43 Eliz. B. R. in an information on the statute of liveries. S. P. Dormer v. Smith.

Hob. 179.
pl. 211.

Mich. 14
Jac. S. C.—
2 Mod. 58.
Sharp v.

[2. The 6 months for proof of a surmise in a prohibition according to the 2d E. 6. shall not be accounted by 28 days to the month, but according to the calendar. Hobart's Reports, 242. between COPLY AND COLLINS resolved,]

Hubbard. Mich. 27 Car. 2. C. B. held accordingly.

* Fol. 522.

3. If an information upon the statute of unlawful games be against J. S. * for 7 months exercise of the game, in this case the month shall be reckoned by 28 days to the month, and shall not be reckoned according to the calendar, M. 11 Jac. B. R. WHETHERED's case, per Curiam.]

[4. If

[4. If a rate be put upon ale and beer by the mayor and chief officers of a town, according to the statute of 23 H. 8. to continue for 6 months next ensuing; this shall not be reckoned according to the calendar, but according to 28 days to the month. P. 7 Car. B. R. adjudged in the case of one EVANS, and divers others BREWERS OF EXETER, where it was averred that they sold contrary to the rate between the time of the rate made, and such a day, which was the end of the 6 months, according to the calendar; but [was] 6 months and 2 weeks according to 28 days to the month, and for this the indictments quashed.]

5. The words *six months*, in the statute of * usury and labourers are to be expounded half a year; (for the year is mentioned in those statutes) and they shall be reckoned according to the calendar, as in case of a lapse. Jenk. 282. pl. 8.

* S. P. Per Popham Ch. J. which none gained. Noy, 37. Anon.

6. In the case of *policy of assurance* made to warrant a ship, one was bound to warrant a ship for 12 months; and the truth was, she did not perish within the time of the 12 months, being accounted according to 28 days; but being accounted by the calendar, as January, February, &c. it perished, &c. 1 Le. 96. pl. 125. Mich. 29 Eliz. in the Exchequer, in Sir Wollaston Dixie's case, Arg. says it was said and holden that the insurer had not forfeited his bond.

7. *Tempus semestre* to prevent a lapse is to be computed by the calendar. 6 Rep. 62. Mich. 3 Jac. C. B. Catesby's case.

Yelv. 100. S. C.— Cro. J. 148. Bishop of Peterbo-

rough v. Catesby.—— And Ibid. 167. pl. 6. in S. C. Yelverton said that Justice Walmsley shewed him a precedent in the time of E. 1. (which was immediately after the statute) where it was resolved that *tempus semestre* should be taken for the half-year, and not for six months only. — Per menses non per hebdomedas. D. 327. b. pl. 7. and in Marg. cites Mich. 5 E. 1. Rot. 100. Queen Eleanor v. the Bishop of Lincoln.—Jenk. 282. pl. 8.—Cro. E. 835. Dormer v. Smith.—Verba accipienda sunt secundum subjectam materiam; and therefore because this computation of the months concerns those of the church, it is great reason that the computation should be according to the computation of the church, which they best know. 6 Rep. 62. Catesby's case.

But where a *presentee* was refused for insufficiency, and notice was given of such refusal, and the cause thereof, it was agreed and resolved by the whole Court, that in the computation of the 6 months, in such cases the reckoning ought not to be according to the calendar, but according to 28 days. Le. 31. pl. 39. Trin. 27 Eliz. C. B. Albany v. the Bishop of St. Asaph.

The 2 months for reading the articles of religion are to be reckoned by 28 days. Lev. 101. Pasch. 15 Car. 2. B. R. Brown v. Spence.

8. A *twelvemonth* in the singular number includes all the year according to the calendar; but *twelve months* shall be computed according to 28 days for every month. 6 Rep. 62. Mich. 3 Jac. C. B. Catesby's case.

9. It was agreed by all the Court, that in a *condition for rent*, as 38 H. 6. 7. and in case of *inrolments*, as 5 Eliz. D. 218. and in case of a *leet* held within a month after Easter and Michaelmas, it shall be accounted 28 days. Cro. J. 167. pl. 6. Trin. 5 Jac. B. R. in case of Bishop of Peterborough v. Catesby.

10. It was moved to quash an indictment upon the statute 13 H. 4. cap. 7. for a riot; for that the inquiry was not within a month,

Keb. 694. pl. 13. says the Court

would not
quash it on
this excep-
tion without
plea.—

S. C. cited

per Cur. 4 Mod. 186. Pasch. 5 W. & M. in B. R. in case of *Barkdale v. Morgan*.

Show. 368.

Burton v.

Woodward,

seems to be

S. C. Ad-

journatur.—

4 Mod. 95.

Burton v.

Woodward.

Adjournatur.

—Comb.

191. S. C.

Adjournatur.

* [273]

a month, (viz.) 28 days after the offence committed; but the Court said, that the time shall *not* be confined to 28 days, but to an *almanack month*. Sid. 186. pl. 9. Pasch. 16 Car. 2. B. R. The King v. Cofins.

11. Upon the statute of 1 W. & M. which appoints all bishops, &c. to take the oaths, the question was, whether the 6 months mentioned in the statute are to be accounted calendar months or lunar months; per Holt & Curiam, absente Gregory, this being upon the construction of an act of parliament, it ought to be construed according to our law, that the 6 months shall be accounted *lunar* months. And Holt * observed, that there was another clause in the act for fellows of colleges who are not ecclesiastical persons, and asked whether the 6 months should be reckoned lunar months for them in this clause, and calendar months as to bishops, &c. in the other clause, and so the same word in the same act be taken in 2 different senses? and he said, No. Curia adversare vult. But they seemed ripe to give judgment that the 6 months should be accounted lunar and not calendar months; and Dolben and Eyre doubted of COPLEY AND COLLINS'S CASE; and Holt said, that that case alone stuck with him, and notwithstanding he inclined fortitur ut supra. Skin. 313. Pasch. 4 W. & M. in B. R. Woodward v. Hamersley.

12. The defendant, in consideration of 20 guineas paid him by the plaintiff, did covenant, upon payment of 500l. more, within one month next following, to transfer to him upon notice, certain East-India shares, &c. the plaintiff averred that he tendered the 500l. within a month, &c. The defendant pleaded that the plaintiff did not tender it within a month; for that before the tender 28 days were past from the day of the date of the agreement. And the truth was, that the plaintiff tendered the money after 28 days, but within a calendar month. Per Cur. In common parlance a month is taken to be 28 days in all cases but in a quare impedit; and words and phrases of speech must be governed by the common acceptance of the people, and as they are generally understood; and so held that the computation in this case must be after the rate of 28 days to the month. 4 Mod. 185. Pasch. 5 W. & M. in B. R. *Barkdale v. Morgan*.

13. In debt upon the statute 5 Eliz. 4. for using a trade, the computation by calendar months was held fatal, but being after verdict it was aided. 12 Mod. 641. Hill. 13 W. 3. B. R. *Stretchpoint v. Savage*, and cites Mich. 6 W. 3. The King v. Stowbridge.

(D) *How to be understood where it is mentioned generally.*

1. **W**HERE a man speaks of the feast of St. Michael, and does not say what St. Michael, it shall be intended St. Michael the archangel, which is the most notable; and not St. Michael in Tumba. Br. Jours, pl. 5. cites 20 H. 6. 23. 2 Inst. 483, 486.

2. But if a man speaks of the feast of our Lady, and does not shew which feast, it is said that this is not good. Br. Jours, pl. 5. cites 20 H. 6. 23.

(E) *Pleadings of Time. Necessary to be pleaded. In what Cases.*

1. **I**N assise in London, it is usual to put the year and day of the disseisin. Contra in other assise; for it is not used but in actions personal, and not in actions real nor mixed; quod nota. Br. Pleadings, pl. 62. cites 20 Aff. 6. See (F)

2. Where a man declares upon an obligation without a date, he ought to declare *quando factum fuit*. Br. Obligation, pl. 66. cites 3 H. 4. 5. per Richill.

3. In trespasss, if a man justifies for tithes as parson at the time of the trespasss, &c. it is not good; because he does not say, that he was parson as well at the time of the severance as at the time of the taking. Br. Pleadings, pl. 15. cites 35 H. 6. 48. [274]

4. So of villeinage, and seising of goods, he ought to say, that he was his villein as well at the time of the first taking as at the time of the second taking. Br. Pleadings, pl. 15. cites 35 H. 6. 48.

5. And where a sheriff justifies an arrest by *capias*, he shall say, that he was sheriff as well at the time of the arrest, as at the time of the receiving of the writ. Br. Pleadings, pl. 15. cites 35 H. 6. 48.

6. Trespass de clauso fracto; the defendant said, that the place is a piece of land, and that J. W. was seised of a house in D. of which this piece was parcel, and infeoffed A. in fee, who infeoffed J. B. in fee who had issue W. and died seised, and W. entered as heir and infeoffed the defendant, and gave colour by J. W. The plaintiff said, that he was seised of a lane in the same vill in fee, of which the place is parcel, and that the defendant did the trespasss, absque hoc, that it was ever parcel of the said house, prout, &c. to which the defendant said, that it was parcel of the house in the possession of J. B. and the others e contra, and it was found for the plaintiff; and exception was taken inasmuch as he did not answer if it was parcel of the house at the time of the dying seised of J. B. and yet good by the opinion of the Court; for when he says, that it was parcel when J. B. was Br. Pleadings, pl 94. cites S. C.

was seised, this shall be intended all the time that J. B. was seised, therefore it was parcel at the dying seised, and it suffices to say that W. ut filius & hæres entered, for this word (ut) is tanta mount, that he is son and heir in fact. Br. Trespas, pl. 304. cites, 3 E. 4. 27.

So where he bought at Bartholomew fair, without shewing the year. Br. Pleadings, pl. 100. cites 12 E. 4. 1. —So if he had said upon a work day.

7. *Trespas of goods taken at A. in the county of E. the defendant said, that the city of London is an ancient city time out of mind, and that there is a market there every day except Sunday, and that H. was possessed of the goods at London, and on Friday before the trespass sold them to the defendant, and did not shew any year; and yet good per Catesby, Chocke, and Littleton, because he said, that there is a market there every day except Sunday. Br. Pleadings, pl. 100. cites 12 E. 4. 1.*

Br. Pleadings, pl. 100. cites 12 E. 4. 1.

Br. Repleader, pl. 31. cites S. C. —So in trespass, when a man justifies by com-

8. *If a man pleads that A. was seised in fee to the use of B. and that B. gave to him the trees, this is not good if he does not say precisely, that A. was seised to the use of B. at the time of the gift; for alteration may be mefne between them. Br. Pleadings, pl. 79. cites 6 H. 7. 3.*

mand of cefni que use, he shall say, that the scoffers were seised to this use at the time of the command. Br. Pleadings, pl. 166. cites 10 H. 7. 26.

So it is if he says, that the place is his franktenement, he shall say, that at the time of the trespass, the place was his franktenement, &c. Br. Pleadings, pl. 79. cites 6 H. 7. 3. —Contra of things which may be intended to have continuance. Br. Pleadings, pl. 79. cites 6 H. 7. 3.

9. *Where a man pleads a lease for years and release, he shall say that he was possessed at the time of the making of the release. Br. Pleadings, pl. 166. cites 10 H. 7. 26.*

10. *The time of seisin in a quare impedit is immaterial, and seisin generally in the time of peace, in the reign of such a king, being alleged, it is sufficient. Per Holt Ch. J. Skin. 660. in case of the King v. the Bishop of Chester.*

11. *Assumpsit to run a horse at such time and place as the plaintiff should appoint, and the plaintiff declares; that he did appoint such a day; it was doubted, whether this was appointing a time, which is more certain and determinate than a day: per Curiam, by appointing a day the law will supply the rest, and fix it to the most usual and convenient time of that day. 3 Salk. 346. pl. 1. Trin. 11 W. 3. B. R. Scott v. Hogson.*

12. *In pleading want of assets by an administrator the time must be set forth. See 12 Mod. 611. Hill. 13 W. 3. Ingram v. Foot.*

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13. *In transitory actions time and place are not material, but the plaintiff may declare at any time or place. 10 Mod. 251. 348. Hill. 3 Geo. 1. B. R. Case v. Hawkins.*

(F) Pleadings. In what Cases a *Day* must be shewn certain.

1. **I**N trespass the defendant pleaded a gift of the plaintiff; and the plaintiff said, that after this gift, and before the trespass, the defendant re-gave it to the plaintiff, by which he was possessed till the trespass, and the defendant maintained his bar, absque hoc, that he re-gave after the first gift; and this plea admitted without alleging a day certain. Br. Pleadings, pl. 142. cites 10 H. 6. 16. Br. Visne, pl. 110. cites S. C.

2. In debt upon account by an executor, the defendant said, that the testator made the plaintiff and one W. his executors at London, who is in full life, not named in the writ, judgment of the writ; and the plaintiff said, that after this the testator made him his sole executor at C. in the county of Middlesex, judgment, &c. To which the defendant said, that the truth is, that he made the plaintiff his executor sole, but after this he made both his executors; absque hoc that he made the plaintiff his sole executor after this. And he was compelled to shew day certain, viz. that such a day he made both his executors; absque hoc that he made the plaintiff executor sole after this. For, per Prisot, if all was alleged in one county, then the county may inquire of the time well enough; or if all was alleged in two counties which might join, visne should be of both counties; but London cannot join with any. Therefore by him and Moile day certain shall be alleged, that the visne shall come where the affirmative is alleged. Br. Visne, pl. 5. cites 33 H. 6. 44.

3. Where a man is bound [that J. S. shall] enter into such land before Michaelmas peaceably, it is sufficient to say, that he entered into it peaceably before Michaelmas, without declaring what day. Br. Conditions, pl. 79. cites 37 H. 6. 18.

So where the condition of an obligation was, that the obligor shall not enter nor

claim such a house; and the defendant said, that he did not enter nor claim. Keble said, he claimed; prisot. Brooke says, it seems that he ought to say that such a year and day he claimed. Br. Conditions, pl. 130. cites 4 H. 7. 13.

4. *Trespass of a close broken, &c.* The defendant justified, that J. S. held of him, and aliened in mortmain, and he entered for the alienation within the year. And no plea; per Cur. Because he does not shew what day the alienation was made, so that it may appear whether he entered within the year. Br. Jours, pl. 49. cites 7 H. 7. 5.

Br. Count, pl. 59. cites S. C.—

S. P. for it shall not be intended that he entered within the year, if it be

not shewn; for the time there is parcel of the substance of the bar, and it shall not be a good plea there to say, that he entered within the year, without shewing the day certain, for the notice of the jurors. Arg. Pl. C. 27. b. in case of Colthirst v. Bejushin.—S. P. 33. b. in S. C. by Mountague Ch. J.

5. But in *formedon*, if the tenant pleads nontenure, and the demandant said that he was tenant, and made alienation to persons

Br. Count, pl. 59. cites S. C.—

Heath's Max. 8. cites S. C. & 9 H. 6. 115. 16. a. *sons unknown, to the intent, &c. and that he took the profits, and that he brought his action within a year of the title accrued; there he shall not shew day of the alienation, but when the action accrued to him. Agreed, per tot. Cur. Br. Jours, pl. 49. cites 7 H. 7. 5.*

Br. Count, pl. 59. cites S. C. *6. And in dum fuit infra etatem he shall not shew day of the alienation. Br. Jours, pl. 49. cites 7 H. 7. 5.*

[276] S. P. *7. But note, that in real actions, it is not usual to shew the year and day, contra in personal actions. Br. Jours, pl. 49. cites 7 H. 7. 5.*

Nor in mixt actions, as in assise, waste, and quare impedit. Br. Count, pl. 59. cites S. C. ——— Heath's Max. 8. cites S. C. and 9 H. 6. 115, 116.

8. If one be bound in an obligation to infeoff another between the date of the obligation, and the feast of St. Michael next ensuing, there, if action be sued upon the obligation, it is no plea to say that he infeoffed him, but he ought to shew the day certain; for the time is parcel of the substance of the bar, and if it be omitted it shall never be intended. And also the plea should not have been good, if he had said that he infeoffed him before the feast of St. Michael, without shewing the day certain, for the information of the jurors, if issue be joined. Arg. Pl. C. 27. b. Pasch. 4 E. 6. in case of Colthirst v. Bejushin.

9. Lessee brought bill of covenant against lessor, who had covenanted with him, that if he was lawfully ejected of any part of the land, that he should have so much other land of the lessor during the same term, and he shewed that he had been ejected of such a piece of the land, and did not say when; and it was held that he ought to have shewn the day certain, inasmuch as it is matter of substance. Arg. Pl. C. 27. b. in case of Colthirst v. Bejushin.

As if one justifies for common between Lemas and Candemas, he 12. It is to be noted always for a general rule, that if he who pleads in bar is prescribed to a certain time, he ought to shew the day of his act certainly; per Mountague Ch. J. Pl. C. 33. b. in case of Colthirst v. Bejushin.

ought to shew certainly the time of his using thereof; so that it may appear to be done between this time. Pl. C. 33. b. in case of Colthirst v. Bejushin.

So he who justifies by licence, by warrant, or by authority, ought always to shew the time certain of his justification. Pl. C. 33. b. in case of Colthirst v. Bejushin.

But he who pleads in the negative, need not plead certainly. Pl. C. 33. b. in case of Colthirst v. Bejushin.

But he who pleads in abatement of a writ, or pleads a plea after the last continuance, ought to plead certainly; per Mountague Ch. J. who said that these were observed as principles in our law. Pl. C. 33. b. in case of Colthirst v. Bejushin.

Noy, 93. S. C. but S. P. does not appear. ——— Lat. 205. S. C. 11. In replevin the defendant made consufance for a rent due to J. S. who was seised as remainder-man in tail, and averred that the tenant for life was dead, but did not allege the precise time when he died. It was † argued, that he need not, because an avowry (which is in lieu of an action) is a real action, and in real actions the

the precise day need not be alleged. Poph. 200. Mich. 2 Car. but S. P. does not appear. —
Dicker v. Moland.

Palm. 508. Hill. 3 Car. B. R. S. C. and S. P. argued accordingly; but the opinion of the Court seemed against him, and advised the taking a new distress, because here the time of the death of tenant for life does not appear whether it was before the rent arrear or not

† 3 Nels. Abr. 287. cites Poph. 201. DITCHER v. MORLAND as adjudged, that he need not shew the precise time; but this seems to be an error of the press.

12. In *assumpsit*, the plaintiff counted, that defendant in consideration of 2 s. promised to carry such goods aboard a ship, if plaintiff would deliver them to him, and shewed that he delivered them, but defendant did not carry them aboard. But exception was taken, because he said only *deliberavit*, without shewing when or where, and then the law says they were not delivered. Per Jones J. The same is but matter of inducement to the promise, and ought not to be shewed so precisely. Godb. 404. pl. 484. Pasch. 3 Car. B. R. Mole v. Carter.

(G) Pleadings. Good. Where Time is made [277] Parcel of the Issue.

1. **I**N replevin defendant avowed, for that J. S. was seised and made a lease to B. for 21 years, who being possessed, assigned his term to H. the avowant, by which he entered, and was possessed; and on the first Dec. 18 Car. 2. at F. demised for part of the term to the plaintiff rendering rent; and for so much rent arrear he avowed the taking the beasts. The plaintiff pleaded in bar, that the avowant upon the said first December 18 Car. 2. aforesaid at F. did not demise modo & forma, as the avowant has alleged, *et hoc, &c. unde, &c.* After verdict and judgment for the plaintiff in C. B. it was assigned for error in B. R. that this was an immaterial issue, by making the day and place parcel of the issue; for a demise at another day and place would maintain the avowry, and the putting them in is only for conformity in pleading, but the plea should have been general, *non dimisit modo & forma, &c.* The Court could not tell for whom to give judgment according to the right of the matter; and after the matter had been twice argued, whether this case was remedied by the new statute which cures defaults where the right is tried, the Court were of opinion that it was not, and doubted what to do. But afterwards, upon other exception taken by Hale Ch. J. to the avowry, the judgment was affirmed. 2 Lev. 11. Trin. 23 Car. 2. in B. R. Holbech v. Bennet. 2 Saund. 317. BENNET v. HOLBECH, S. C. says that Hale Ch. J. was of opinion that the issue and verdict was aided by the statute of jeofails, but Twisdalen contra, and that it was not aided by any statute of jeofails; but the judgment was affirmed. — 2 Keb. 825. pl. 45. S. C. according to 2 Saund. as above.

2. In account the plaintiff declared, that upon the 1st March, 22 Car. 2. and thence to the 1st May, 27 Car. 2. the defendant was his receiver, &c. Defendant pleads, that from 1st March, 22 Car. 2. to the 1st May, 27 Car. 2. he was not his receiver, &c. The plaintiff demurred specially, because the time from the 1st March to the 1st May are made parcel of the issue, which it ought

ought not; because plaintiff must allege a time for form's sake, and defendant might say he was not receiver *modo & forma*, &c. Besides the defendant was charged as receiver on the 1 day of March; and he pleads, that he was not receiver from that day; so the day was excluded, which the Court held an incurable fault, and that the time ought not to be made parcel of the issue. And judgment, quod computet. 2 Mod. 145. Hill. 28 & 29 Car. 2. B. R. Brown v. Johnson.

3. When *by a traverse* the time is made part of the issue, such traverse is never good; per Cur. 5 Mod. 286. Mich. 8 W. 3. Blackwell v. Eales.

For more of Time in general, see Arbitrement, Condition, Limitation, Payment, Stocks, Tender, and other proper titles.

See Right
(A) pl. 4.

(A) What is.

1. **P**OSSESSION is a good title, where no better title appears. See Maxims, in *equali jure melior est conditio possidentis*; and *qui prior est tempore, potior est jure, in equali jure*.

2. A prescription, that is to claim a real interest in alieno solo, is a title, and as a title must be strictly and curiously pleaded; per Sir Francis North Arg. Vent. 386. in case of Potter v. North.

(B) Preference. Where a Man has several Titles, which shall be preferred.

See more at
tit. Remit-
ter, and at
Maxims
quando duo
jura, &c.

1. **W**HEN 2 titles concur, the best shall be preferred; as where disseisor leases the land to the disseisee for years, or at will, if he enters, the law will say that he is in of his ancient and better title. Finch's Law, 16. a. f. 95.

2. It was enacted by act of parliament, that all the lands of S. should be forfeited to the king, of whomsoever they were holden. S. held some lands of the king; the king had that land by *escheat by the common law, and not by the statute.* Arg. Godb. 309. cites Sir Ralph Sadler's case.

3. *Abbot* seised in right of his house, committed *treason*, and made a lease for years, and then surrendered his house to the king after the statute 26 H. 8. 13. It was adjudged that the king was in by the surrender, and not by the statute, and so should not avoid the lease. But if the king had it by force of the statute, then he should have avoided the lease. Arg. Godb. 311. cites the Abbot of Colchester's case.

S. C. cited 4 Le. 141. in Englefield's case, and in Mo. 319. S. C.

4. *Tenant in tail, reversion to the king.* Tenant in tail makes a lease for years, and is attainted of *treason*, the king shall avoid the lease upon construction of the statute of 26 H. 8. 13. which gives the land to the king for ever. Arg. Godb. 311. cites Pl. C. 360.

5. If a *devise* be made of land to the heir at law, of the same estate as would descend, it is a void devise; for the descent shall be preferred. Per Doderidge J. Godb. 412. pl. 489. Trin. 21 Jac. B. R. in Sommers's case.

See more of this at tit. Devise.

(C) *Excuse. Coming in by Title, how far favoured* [279]
in Law.

1. IF a man disseises me, and makes a feoffment, and I re-enter, I shall not have trespass against the feoffee; for he is in by title and no trespassor to me. Br. Trespas, pl. 35. cites 34 H. 6. 30. by the best opinion.

So of the 2d disseisor, by some; quere inde, for he is in by tort.

Br. Trespas, pl. 35. cites 34 H. 6. 30.——Trespas lies for disseisor against feoffee of disseisor; per Keble and Wood. But Constable, Kingsmill, Frowike, and others, seemed e contra; for by the common law, he that was in by title should not be punished. For if the heir of disseisor had lands which descended, no damages should be recovered against him, any more than where he was in by feoffment, and that was the reason of making the statute of Gloucester, that every one should answer for his own sin; so where disseisor sells trees, and the vendee cuts and carries them away, but where the carrying away is to the use of disseisor, it is otherwise. But where feoffee was party to the disseisin by covin, &c. he should be punished. As if I disseise a man, and infeoff my father, who dies seised, assise lies against me. Hill. 13 H. 7. 15. b. pl. 11.——See Trespas (T) pl. 8. and the notes there.

2. But where disseisor commands his servant to do an act upon the land, and I re-enter, trespass lies against the servant, by the best opinion. Quere. Br. Trespas, pl. 35. cites 34 H. 6. 30.

(D) Pleadings. Declaration. In what Cases a Title must be *set forth in the Declaration.*

So in assise of common of piscary the plaintiff it was com-

1. **I**N assise of common the plaintiff shall make title in his plaint; quod nota: *though the defendant or his bailiff cannot challenge it*; quod nota bene. Br. Titles, pl. 22. cites 15 Aff. 5.

pelled to shew title, because it was against common right, and so he did; and this seems to be in his plaint; by which he said that S. was seised of the manor of D. with the piscary appendant, and gave him the manor cum pertinentiis simul cum tota piscaria, &c. and alleged seisin per my & per tout. Br. Titles, pl. 48. cites 34 Aff. 11. — Br. Plaint, pl. 17. cites S. C.

Where a thing appears to be against common right as it is of an office common, &c. there a

2. The plaintiff need not to make title in the plaint, but where the plaint is of such a thing, of which assise did not lie at common law but by statute, as of common, office, estovers, &c. for it lay of the land and rent at the common law. Br. Titles, pl. 25. cites 22 Aff. 45.

man shall make his title in his plaint; but of a rent *e contra*, though it be a rent-ferk or rent-charge. For that does not appear to be against common right; for it may be rent-service by indentment till the title be made; and when the plaint has the appearance of a thing which may be intended to stand with common right, there the plaintiff is not always compelled to make his title in his plaint. Br. Assise, pl. 13. cites 35 H. 6. 6, 7. — Br. Plaint, pl. 1. cites S. C.

3. In quod permittat of a way, &c. the plaintiff shall make his title in his count; per Cur. Br. Titles, pl. 60. cites 30 H. 6. 8.

4. So in secta molindini, &c. because it is a thing issuing out of another's soil. Br. Titles, pl. 60. cites 30 H. 6. 8.

5. Contra of common right. Br. Titles, pl. 60. cites 30 H. 6. 8.

As in trespass quare vi & armis warrenam suam intravit, and such like, the defendant shall not say, that the place is his franktenement, judgment if without title * shewn, &c. For this action is in the possession, and only trespass to recover damages, and not to recover the warren. Br. Titles, &c. pl. 3. cites 34 H. 6. 28 & 43. — Br. Warren, pl. 2. cites S. C.

* [280]

Heath's Max. 93. cites S. C.

6. Where a man is not to recover the thing, but damages for the thing, he shall not be compelled to shew title; and *e contra* in quod permittat, assise, &c. where he may recover the same thing. Note the diversity. Br. Titles, pl. 3. cites 34 H. 6. 28 & 43.

the defendant shall not say, that the place is his franktenement, judgment if without title * shewn, &c. For this action is in the possession, and only trespass to recover damages, and not to recover the warren. Br. Titles, &c. pl. 3. cites 34 H. 6. 28 & 43. — Br. Warren, pl. 2. cites S. C.

7. Entry in nature of assise of common; the defendant pleaded non disseisvit; and the plaintiff gave prescription in evidence, and did not allege it in his count, and yet it was permitted; for it seems that title cannot be made in the count in this action, as in the plaint of assise, and therefore does not lie of the common. Br. General Issue, pl. 68. cites 4 E. 4. 1.

8. Assise of an office, the plaintiff made title in his plaint, and it seems that he ought so to do; for this is of a thing of which assise does not lie by the common law. Br. Titles, pl. 54. cites 2 H. 7. 12.

9. In waste, when the defendant makes default at the grand districks, or in a quare impedit, or in an avowry, in such cases the plaintiff

plaintiff ought to count; *but he has no occasion to count of a year and day*; for the defendant in one case, and the plaintiff in the other, where such default is, has no day in court to make a defence; but in both cases a good title ought to be shewn. Jenk. 124. in case, 52.

10. For the *office of parker or steward*, there is no occasion for any title; for they are *offices of common right*. It is otherwise of a *rent-charge*, or *rent-seck*, which are against common right. In an assise of these, a title ought to be made. Jenk. 130. pl. 64.

11. Action *sur le case*, supposing that he was *seised* in fee of the manor of H. and of a *fair* to be held there every Ascension-day, and that the *defendant disturbed him to take toll*, &c. The defendant pleaded not guilty, and found against him. And now moved in arrest of judgment, that the declaration was not good, because he doth not shew a title to the fair by grant, nor by prescription, so he hath not any cause of action, sed non allocatur; because *it is but a conveyance to the action, and is not any claim thereof*, as to the right, as in a quo warranto; and therefore the declaration, without special title comprised therein, is good. Wherefore it was adjudged for the plaintiff. Cro. J. 43. pl. 9. Mich. 2 Jac. B. R. Dent v. Oliver.

S. C. cited Arg. 6 Mod. 313. to be good, because it was against a wrong doer.

12. The plaintiff declared in *action sur le case for disturbing his cattle*, and lays no title but only in using their *common in such a close*, but lays no title; and *judgment by nil dicit*. And afterwards, upon a writ of error, exception was taken, for that he lays no title, which he ought in this case, where he claims an interest, and a *charge in the soil of a stranger*, especially here, being upon a *nil dicit*, or upon a demurrer. After a verdict, it is true, it will be well enough; for it shall be presumed the judge, upon the trial, made them shew their title. Pollexfen, on the other side, said, that this action being upon the *possession*, is well enough; and compared it to a *way*, to a case of *lights*, to a *water-course*, &c. and cited cases where such actions had been brought. And cited, 1 Cr. 575. the case of SANDS v. TREFUSIS, where an action for stopping the water-course, without laying a title, was held good upon demurrer. Skin. 115. Trin. 35 Car. 2. B. R. Brown v. Booking.—Cites 2 Cr. 121.—1 Cr. 325. 499. 575.—2 Cr. 673.

S. C. in error ruled that he need not shew a title, and it appears not to be the defendant's land. Skin. 213. Bold v. Broking.

13. Where a *common* or *way* is claimed, the title ought to be set forth in the declaration; but for a *fair* or *franchise*, which is no charge to another's soil, there *habere debuisse* is good without more; per Holt Ch. J. 12 Mod. 35. Pasch. 5 W. & M. B. R. Anon.

14. Where *action is brought upon the possession*, and is founded upon a wrong done upon the possession, and not to the title, as if brought by a commoner for digging coney-burrows, so that he cannot enjoy his common in tam amplo modo, he need not set a title forth either by grant or prescription. 12 Mod. 97. Trin. 8 W. 3. B. R. Birt v. Strode.

15. A *seisin in fee* is not necessary to be set forth, but where a *prescription* is to be made; and therefore a declaration on the

S. C. cited per Holt J. 6 Mod. 313.

in case of
Tenant v.
Goldwin.

Where the
demise was
made by him-
self, plaintiff
need not set
forth any
title; but

where it was made by his ancestor, or another, and he brings his action, and entitles himself under such, he must set forth his title. Holt's Rep. 568. Willet v. S. C.

possession where no prescription is made, is as good as upon a seisin in fee. 12 Mod. 98. Birt and Strode.

16. *Covenant by an heir against an assignee for rent*; it seems that this being brought on the title, the title ought to be *set forth in the declaration*, and that the want thereof will not be made good by verdict. See 11 Mod. 179. Trin. 7 Ann. B. R. Willet v. Boscomb.

11 Mod. 168.
pl. 4. S. C.
but S. P. is
not expressly
mentioned.

* Holt
Ch. J. al-
lowed that
formerly,
and still,
there is a
difference
between
charging a
tortfeasor,
and the te-
nant of the
land; for to
charge a

17. A. was possessed of a close adjoining to a close of B. the fence between the said 2 closes had time out of mind been repaired by the tenants and occupiers of B.'s close. The fence was not repaired; so that B.'s cattle came into A.'s close; A. brought an action on the case against B. setting forth this matter, and had judgment in C. B. and upon error brought in B. R. this judgment was affirmed. And per Cur. this is a charge upon the defendant against common right; for the law bounds every man's property, and is his fence; and this is obliging another to make a fence for him. And where a charge is imposed upon another against common right, and the charge is laid on him as owner of the soil, or * *tertenant*, the plaintiff in his declaration must make himself a good title; but where he declares against the defendant as a wrong-doer only, and not as *tertenant*, it is sufficient that the plaintiff declares on his possession. 1 Salk. 335, 336. Mich. 9 Ann. B. R. Starr v. Rookesby.

tertenant, one must make a title by grant or prescription; but none need be made against a wrong-doer. 6 Mod. 313. Mich. 3 Ann. B. R. in case of Tenant v. Goldwin.

(E) In what Cases a Title must be set forth in the Pleading.

1. **I**N assise, if the tenant makes bar by H. who was heir of N. and shews certainly, &c. the plaintiff cannot traverse that H. was not heir of N. without making to himself title; quod nota; for in assise the plaintiff shall always make to himself title. Br. Titles, pl. 21. cites 14 Ass. 10.

Br. Titles,
pl. 24. cites
S. C.

2. Assise against 2; the one pleaded a release of all actions personal, and the other jointenancy with a stranger, and none took upon him the tenancy, and the plaintiff chose him who pleaded the release for his tenant, and the assise awarded to inquire of the tenancy, which found for the plaintiff; by which he who pleaded the release pleaded it again without taking the tenancy, and the plaintiff said that after the release he was seised and disseised and found for, him; by which he recovered and the other brought writ of error, because the plaintiff chose his tenant, who pleaded in bar, and the plaintiff did not make title; and yet because the defendant who pleaded the release did not take the tenancy, therefore the judgment was affirmed. Br. Error, pl. 115. cites 17 Ass. 25. and 19 Ass. 3.—

But

But 17 Aff. 25. the opinion of the Court was against the plaintiff in the assise. Br. Ibid.

3. In trespass, the defendant said that he gave to W. in tail, who had issue M. who married Q. and had issue, and died, and the issue died, without issue, and Q. tenant by the curtesy aliened to the plaintiff in fee, by which the defendant entered for alienation to his disinherison; and the plaintiff said that Q. ne aliena pas, and a good plea without shewing title; quod nota. And so it seems that a man shall not be compelled to shew title in trespass; for he by his possession [282] has title against all who have no title; nota; for trespass is supposed in the possession. Br. Trespass, pl. 38. cites 40 E. 3. 5.

4. If a man traverses the bar, the defendant need not make title in trespass; otherwise it is in assise. Br. Titles, pl. 6. cites 40 E. 3. 5.

The plaintiff may traverse the bar, without making title

in trespass; per tot. Cur. except Brian. Br. Titles, pl. 52. cites 18 E. 4. 10.

5. In mortdancestor, &c. it is agreed that the tenant may say that the plaintiff has an elder brother alive, or that he is not next heir, &c. without making title; for the action affirms him [tenant]. Contrary against a trespassor; note the diversity. Br. Trespass, pl. 57. cites 47 E. 3. 5.

6. In cosinage, the plaintiff intituled himself as cousin and heir, and the tenant said, that he who is supposed to die seised, had issue W. born and begotten at D. who is alive; judgment si actio; and a good plea without intitling himself; for he has the possession; and therefore if he can prove that the demandant has no title, it is sufficient. Br. Bar, pl. 17. cites 11 H. 4. 56.

7. But in trespass, if the defendant intitles a stranger, yet this is no plea without intitling him to do the trespass; for there the plaintiff was supposed to be in possession at the time of the trespass; note the diversity. Br. Bar, pl. 17. cites 11 H. 4. 56.

8. In trespass upon anno 5 R. 2. it is a good plea for the master of an hospital, that J. S. his predecessor was seised and died, and he was elected master, and entered, and give colour; for if he conveys to himself a lawful entry, it is sufficient. But contrary in assise, for there he shall make title; for it is not as a dying seised, and a descent; quod nota differentiam by several. Br. Assise, pl. 11. cites 34 H. 6. 27.

9. In trespass, if the defendant pleads bar, and gives colour, the plaintiff ought to make title. Br. Titles, pl. 44. cites 9 E. 4. 46.

S. P. Per Pigot and Jenney. Br. Trespass, pl. 188. cites 9 E. 4. 49.

10. But where the defendant pleads bar, and gives title in the same bar, and destroys it, there it suffices for the plaintiff to maintain the same title without making other title. Br. Titles, pl. 44. cites 9 E. 4. 46.

S. P. Per Pigot and Jenney. Br. Trespass. pl. 188. cites 9 E. 4. 49.

11. As in trespass the defendant says, that he was seised, till by B. disseised, who infeoffed the plaintiff, upon whom he entered; there it suffices to say, that B. did not disseise the plaintiff. Br. Titles, pl. 44. cites 9 E. 4. 46.

S. P. Per
Pigot &
Jenney. Br.
Trespafs, pl.
188. cites 9
E. 4. 42.

12. *And in assise, if the tenant says, that he infeoffed the plaintiff upon condition, and for the condition broke he entered; there the plaintiff may say, that they were not broken.* Br. Titles, pl. 44. cites 9 E. 4. 46.

13. *So if the tenant says, that he within age infeoffed the plaintiff upon whom he re-entered, there it suffices for the plaintiff to say, that he was of full age tempore feoffamenti, without making other title. Quære; for it is but the opinion of some, and several e contra.* Br. Titles, pl. 44. cites 9 E. 4. 46.

14. *So if he says, that he leased to the plaintiff for life who aliened in fee, and he entered, the plaintiff may say, that he ne infeoffa pas.* Per Pigot and Jenney. Br. Trespafs, pl. 188. cites 9 E. 4. 49.

15. *In trespafs the defendant justified for tithes as parson imparsoned, and was compelled to shew how he came to the parsonage, and so he did.* Br. Pleadings, pl. 117. cites 21 E. 4. 65.

[283] 16. *If in case for disturbing his common, &c. plaintiff counts on his possession, and after it appears by pleading, that defendant is owner of the land, there a title must be set out. As in trespafs for taking and chasing his cattle, if defendant justifies as in his freehold, and that he took them damage-feasant, there the plaintiff must shew forth some title in his replication, in answer to that of the defendant's in his bar. But in a declaration, where the defendant may be as well supposed a stranger as an owner, there no title is necessary to be shewn.* Per Holt Ch. J. in delivering the opinion of the Court. 12 Mod. 98. Trin. 8 W. 3. B. R. in case of Birt v. Strode.

Comb. 472.
S. C. says,
the defend-
ant demur-
red upon the
plaintiff's
replication,
because he
ought to
have tra-
versed the
title set out
in the avow-
ry; it being
necessary in
this action to
set forth a
title, and
therefore it
differs from
an action of
debt for
rent, for
that being a
personal ac-
tion, the

17. *Replevin; the defendant avowed for rent, that he was possessed of a house for divers years then, and yet to come; and that he leased it to the plaintiff from year to year, &c. The plaintiff replied, nil habuit in tenementis. Defendant rejoined, quod satis habuit in tenementis. And upon demurrer to the rejoinder it was alleged, that the defendant in the rejoinder should have set forth a title. But Northey for the defendant moved, that there was no necessity so to do; for though in debt for rent, if the defendant pleads in bar nil habuit in tenementis, the plaintiff in his replication must shew a title; because in debt for a rent, the plaintiff is not obliged to shew a title in his declaration, but quod cum dimisit is sufficient, yet in an avowry it is otherwise, for in an avowry some kind of title must always be shewn, as was here, viz. that he was possessed for divers years then and yet to come; which being done, there is no necessity to set out a title again in the rejoinder. Whereon the Court took time to consider. And after Northey said, he could not make good the avowry, and therefore prayed leave to amend, paying costs. Quod Cur. concessit. 12 Mod. 188. Pasch. 10 W. 3. B. R. Chaloner v. Claiton.*

title need not be set forth; and if it should, would be unnecessary, and therefore need not be answered, as it ought to be in this case. And the case of SYMONS v. PASHLEY, 2 Jac. 2. was cited as authority in point; and the Court inclined to that opinion. Sed adjournatur.—3 Saik. 306. pl. 1. S. C. according to 12 Mod. and that the demurrer was to the rejoinder, and that Mr. Northey moved to amend it; for that he said he could not make it good for want of setting forth a title, and that is not proper in a rejoinder.—In an avowry a title must be shewn; per Holt Ch. J. 11 Mod. 220. Pasch. 8 Annæ, in case of Harrington v. Bush.

18. In replevin for taking a horse, the defendant *avowed*, that he was possessed of the close, being the locus in quo, &c. for a term of years yet to come, and being so possessed, the horse was damage-feasant there, &c. The plaintiff replied, that the defendant was to keep up his fences round the said close, but that the same being down, and out of repair, the horse escaped into the close for want of good fences, upon which they were at issue; and at the trial the plaintiff was nonsuited; and now it was moved in arrest of judgment, that this avowry was ill, because in all avowries for damage-feasant the avowant must shew where the fee is, and how the particular estate is derived, quod fuit concessum per Curiam, if there is a demurrer to such avowry; but because the plaintiff by his replication had waived the matter, and confessed and admitted a possession in the avowant, that is sufficient to justify a distress damage-feasant, and has cured this defect in the avowry. 3 Salk. 307. pl. 3. Trin. 12 W. 3. B. R. Freeman v. Jugg.

19. Trespass for going over the plaintiff's close with horses, cows, and sheep; the defendant justifies, that he has a way for horses, cows, and sheep, and says, that such a day he went over with horses; and upon demurrer it was adjudged ill; for it is a justification only for horses. Judgment for the plaintiff. Sed quære. 11 Mod. 219. pl. 7. Pasch. 8 Ann. B. R. Roberts v. Morgan.

20. Action of trespass for taking cattle, the defendant pleads quod possessionatus fuit of the close, and that he took them damage-feasant. The question was, whether in this case possessionatus fuit was sufficient, or whether the defendant should have set forth his title. Holt Ch. J. said, that he thought the title could not come in question; for the action is brought only for taking his cattle. If he had claimed the land, the action should have been for entering the land; but where the trespass is only for a personal act, as beating or taking cattle, possessionatus is sufficient. And judgment for the defendant. 11 Mod. 219, 220. pl. 9. Pasch. 8 Ann. B. R. Harrington v. Bush.

&c. for a term not expired; and A. being so possessed, and the sheep in the close * doing damage, be by command of A. and as his servant, drove them out and impounded them. To this the plaintiff demurred, and shewed for cause, that there is no title set forth; and to justify this demurrer were cited for the plaintiff, Yelv. 74. 2 Cro. 291. Mo. 847. Holt Ch. J. gave his opinion as here, and per Cur. judgment for the defendant.

* [284]

21. If A. is possessed, and B. comes and treads down his corn, and A. molliter manus imposuit to put B. out of his corn, for which B. brings assault and battery, A. may plead quod possessionatus fuit &c. and that he molliter manus imposuit to put C. out of his corn; and it is good without setting forth a title, for the action is transitory and cannot be made local but by a clausum fregit. Indeed, in an avowry a title must be shewn; but that is not like this case. Per Holt Ch. J. Powis and Gould of the same opinion. 11 Mod. 220. in case of Harrington v. Bush.

(F) *Pleadings thereof, how. And the Difference thereof in the Writ or Count, or in Bar.*

1. **I**N scire facias a man pleaded, that his father was seised of the manor, and died seised, and it descended to him as son and heir; and per Cur. he ought to shew of what estate his father was seised; quod nota. Br. Pleadings, pl. 33. cites 24 E. 3. 75.

2. Error: a rent was granted of all his lands and tenements in B. and the title was, that he was seised of certain lands and tenements in B. and yet judgment affirmed; for it was said, that it is apparent; but Brooke says, quod mirum, for uncertain. Br. Pleading, pl. 17. cites 8 H. 4. 19.

3. In assise, the tenant said that A. held for life, the reversion to J. S. who granted it to his father. The tenant attorned and died; the father entered and died, and he entered as heir, and gave colour; and there it was held, that he ought to shew of whose lease the tenant for life was seised; and therefore he shewed of whose lease. But Brooke says, it seems that in pleading he ought to shew, that A. was seised in fee, and leased, &c. But in writ or declaration he may say, that A. gave or demised, &c. without alleging that A. was seised, and gave or demised. Br. Pleadings, pl. 18. cites 9 H. 4. 5.

Not the heir
in avowry
need not al-
lege what
day the an-
cestor died.

4. Avowry by tenant in dower, after endowment pleaded, assigned to her, she need not allege what day her dower was assigned. Br. Pleadings, pl. 19. cites 11 H. 4. 63.

Br. Pleadings, pl. 19. cites 11 H. 4. 63.

5. If a man makes title in assise, or pleads fine between him and a stranger, or a recovery, he shall say, that the parties to the fine or the tenant in the recovery were seised at the time of the fine or recovery, and this by way of title or pleading; but contra by way of formodon or other action, or by way of declaration. Br. Titles, pl. 59. cites 10 H. 6. 21.

6. By way of title or pleading, as in barr, title, &c. a man shall say, that he was seised, &c. and leased or gave, but by way of writ or count he shall say, that he gave or demised, without shewing that he was seised and leased, or gave; note a diversity. Br. Pleadings, pl. 13. cites 34 H. 6. 48.

7. *Præcipe quod reddat* of 40s. rent, the plaintiff in his title said that the tenements put in view, out of which the said rent arises, was a messuage and 10 acres of land in S. which makes the house and monastery of S. and so they did make and were time of mind situate upon the said 10 acres, &c. Br. Pleadings, pl. 29. cites 9 E. 4. 19.

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8. Debt upon a lease for years by the plaintiff to the defendant, who said, that E. was seised in fee and leased to the plaintiff at will, who leased to the defendant, upon whom E. entered and ousted him, before which entry riens arrear; and it was held that it suffices for the plaintiff to say, that E. did not lease to him at will, without making other title, quod nota & quære. Br. Pleadings, pl. 48. cites 21 H. 7. 20.

(G) Pleadings. *What shall be said the Title, or only Conveyance to the Title.*

1. **I**N assise of rent, the plaintiff made title that A. his ancestor had been seised of the rent time out of mind in fee, and that A. granted the rent to C. in fee, and that it is devisable by custom, &c. and that C. devised to D. which D. devised to the plaintiff, who was seised and disseised, and shewed the deed; and well; for the prescription is the title and all the rest is only conveyance. Br. Titles, pl. 50. cites 38 Aff. 23.

(H) Pleadings. *Where it must be set forth at large.*

1. **E**XECUTOR of him who had land delivered to him by elegit brought assise, and made general plaint; and good. Br. Titles, pl. 25. cites 22 Aff. 45.

2. In assise the tenant pleaded by escheat of his tenant, and gave colour to the plaintiff, and good, and the plaintiff said, that J. N. was seised, and infeoffed him, and so was he seised till disseised, &c. and no title per Cur. For he has not traversed the bar, nor confessed and avoided it; and so it seems, that it is no bar at large, quære inde. Br. Titles, pl. 46. cites 27 Aff. 71.

3. A man need not make title at large unless in * assise only and in no other action, per Moile; which was not denied. Br. Titles, pl. 4. cites 34 H. 6. 46.

* Br. Titles, pl. 12. S. P. cites 21 H. 6. 18. and pl. 36. cites

5 H. 7. 13.—S. P. Br. Traverse, per, &c. pl. 185. cites 5 H. 7. 11, 12.

(I) Pleading Title. *Without shewing how his Ancestor, or himself came to it after a Feoffment, &c. alleged.*

1. **I**N assise the tenant pleaded in bar deed of feoffment of the grandfather of the plaintiff with warranty as assignee, and shewed both deeds; the plaintiff said, that not confessing the deed, his grandfather was seised in fee and right, and died seised, by which he entered as cousin and heir, and was seised, and a good title, without shewing how he came to it after. Br. Titles, pl. 19. cites 9 Aff. 11.

2. In assise, release with warranty of the uncestor of the plaintiff, [286] was pleaded in bar, and the plaintiff said, that the ancestor died seised after, et non allocatur without shewing how he came to it after. Br. Titles, pl. 20. cites 10 Aff. 23.

But where † feoffment with warranty is pleaded in

bar, the plaintiff was permitted to plead the dying seised of the same ancestor, without shewing how he came to it after. Quære the diversity. Br. Titles, pl. 20. cites 10 Aff. 23.

† S. P. Per Cur. Br. Titles, pl. 55. cites 9 E. 3. Fitzh. Assise.

3. In assise the feoffment of the ancestor of the plaintiff, whose heir, &c. was pleaded in bar, and the plaintiff said, that the same ancestor was

was seised and died seised, and he entered as heir, and was seised and disseised, and a good title by award, without shewing how he came to it after; quod nota; by which the assise was awarded. Br. Titles, pl. 23. cites 17 Ass. 18.

4. In assise, *deed of the ancestor was pleaded in bar, and the plaintiff said, that his ancestor was seised, and died seised, after whose death he entered as heir, and was seised and disseised, &c. and the assise awarded; and yet he did not shew how he came to the land after. Br. Titles, pl. 31. cites 29 Ass. 25.*

5. In assise of rent, *deed of the ancestor was pleaded, and by award the plaintiff was received to say, that the same ancestor died seised of the same rent, without shewing how he came to it after; as well as in assise of land. Br. Titles, pl. 32. cites 30 Ass. 33.*

So if such title was found by verdict after such recovery, per

6. In assise, if *recovery is pleaded in bar against the ancestor of the plaintiff, it is no title that after the recovery the ancestor was seised in fee, and died seised, without shewing how he came to it after. Br. Titles, pl. 55. cites 32 E. 3.*

Cur. Br. Titles, pl. 55. cites 32 E. 3.—*Contra of a gift of the ancestor made by deed. Br. Titles, pl. 55. cites 29 Ass. 25.——And so see a diversity between matter of record, and matter of fact. Br. Titles, pl. 55.*

7. *Mortdancestor of seisin in fee of J. ancestor of the plaintiff, &c. The tenant said, that H. father of the plaintiff, whose heir, &c. was seised in fee and the land is devisable by custom, and he devised to A. for term of life, the remainder to this J. in tail, and the remainder in fee to be sold, and that the tenant for life and the said J. are dead without issue, and conveyed himself to the land by the sale of the fee simple, and shewed the testament of the father; judgment if assise, &c. And per Cur. in this case the plaintiff shall not say, that he was seised in fee, absque hoc, that he had any thing by the devise, without shewing how he came to it after; by reason that the devise binds as a deed indented. Br. Titles, pl. 48. cites 35 Ass. 1.*

8. *Formedon of the gift of R. to B, father of the demandant, in tail, &c. Rede said that before the gift A. was seised in fee, and leased to the said R. for life, which R. after gave to B. in tail, and the said A. entered after the gift made to his disinherittance. Hill said, after this gift, and the entry by A. this same R. was seised, and gave the land to B. in tail, of which gift this action is brought, and no title, without shewing how R. came to it after the forfeiture; by which Hill said, that after the death of A. one T. was seised, and infeoffed R. in fee, who gave to the father of the demandant as in the writ and declaration, &c. Rede said, T. whom you suppose to give, nothing but, &c. and the others e contra. Br. Titles, pl. 43. cites 3 H. 4. 17.*

9. In trespass the defendant pleaded in bar, and gave colour to the plaintiff by lease made to the father of the plaintiff at will, and the plaintiff thinking that his father had died seised in fee entered, &c. The plaintiff said that his father died seised, without shewing how he came to the fee. And good per Cur. Because the defendant [287] in his bar does not bind the plaintiff by matter of record to the estate at will. Br. Titles, pl. 57. cites 10 H. 6. 1.

10. A man shall not make title *after act of parliament, fine, or recovery*, but by matter of later time; for by such act against his father, if he enters again, and dies seised, and his heir enters, this shall not make title to the heir, without shewing title after the recovery, &c. Br. Titles, pl. 63. cites 10 H. 7. 5.

(K) Pleadings *by confessing and avoiding* the Bar by elder Title.

1. **I**N trespass, the defendant made bar, that J. P. was seised, and infeoffed M. who leased to the defendant, &c. The plaintiff said that before that J. P. any thing had, W. was seised in fee, and infeoffed two, who gave to W. and his feme in tail, the remainder in fee to W. and after W. and his feme died without issue, and M. as heir of W. entered, upon whom the plaintiff entered, to whom the said M. released all his right, upon whom J. P. entered and infeoffed 4, who leased to the defendant, upon whom the plaintiff entered, and the trespass mesne; this is a good plea per tot. Cur. Br. Titles, pl. 58. cites 10 H. 6. 14.

(L) Pleading Title *by Recovery*. Good in what Cases, and how.

1. **I**N assise, the tenant pleaded lease by R. his ancestor, whose heir, &c. to K. for term of life, who aliened in fee; by which he entered for the forfeiture as heir of his ancestor, and the plaintiff claiming as heir of R. where he was a bastard, entered, &c. The plaintiff said *protestando*, that he is not a bastard, *pro placito* that he brought assise against the lessee and the alienee, and recovered, at which time this now tenant had nothing, nor ever before; and because the judgment was against a stranger, which does not bind this tenant, and can have no other effect than to put him in the possession which he had before, the Court was of opinion that plaintiff ought not to have assise, and so he was nonsuited. See Fitzh. tit. Title, pl. 7. and Br. Titles, pl. 45. cite 10 Ass. 20.

2. In assise by a feme, the tenant said that at another time the plaintiff brought *cui in vita* of the same land against A. *Que estate he has*, and appeared to it, judgment if to the writ of a more base nature she shall be admitted; and a good plea; for by this was the land discharged of assise. Br. Titles, pl. 35. cites 33 Ass. 5. By which the plaintiff said that A. in the *cui in vita* disclaimed, &c. by which she entered, and was seised until disseised, &c. and a good title, and the assise awarded; for though she by her suit affirmed him tenant at one time, yet she may agree to the contrary with him at another time. Ibid.

3. Where a recovery is pleaded against a man, there, per Finch. the parties against whom, &c. shall not make title of later time, without shewing how they came to it; but he may make title of elder time, without shewing how he came to it. Br. Titles, pl. 7. cites 47 E. 3. 13. As where a man seised of land takes a wife, and makes a feoffment, and ousts the feoffee, and he recovers by assise, the feme brings dower, the defendant pleads the recovery against the baron,

baron, she may say that long time before her baron was seised, so that she might have dower. Br. Titles, pl. 7. cites 47 E. 3. 13.

And in trespass of disseisin taken, a 4. In *trespass*, a recovery is a good title *without shewing matter in fact*; per Prisot. Br. Titles, pl. 51. cites 39 H. 6. 25.

recovery of a *rent service* is a good title to it, and to fealty; for this is *incident* thereto. Quære if the service had been *homage*; it seems all one, because a *præcipe quod reddat* does not lie of homage. Br. Titles, pl. 51. cites 39 H. 6. 25.

5. So of a recovery in *formedon*, without alleging that the donee was seised and gave; per Prisot. Br. Titles, pl. 51. cites 36 H. 6. 25.

6. And the same law of an *assise*, and so in the case of a writ of right of advowson, it is a good title without alleging presentment. Br. Titles, pl. 51. cites 39 H. 6. 25.

7. Contrary of a recovery in *quare impedit*, without presentment; for *quare impedit* may be against *deforceor*, who claims nothing in the patronage, and there he can recover only the presentment; and a writ of right of advowson lies not but against the patron, and there he recovers the advowson. Note the diversity; per Prisot, which none denied. Br. Titles, pl. 51. cites 39 H. 6. 25.

(M) Pleading Title of his own Possession.

1. **I**N assise, the plaintiff said that he himself recovered the tenements by assise against one J. then tenant, and the estate, which the plaintiff here has was by abatement upon J. pending the writ, &c. Judgment, &c. and it was awarded a good bar; to which the plaintiff said that a long time before this writ brought he was seised, &c. And the assise upon this title was awarded, without shewing how he came, &c. Contra in Itin. Derby, per Herle, where the recovery was alleged against the plaintiff; and see that he did not shew how he was seised before the disseisin upon which the other recovered, but only before his writ brought, and the title good, and the assise awarded; quod quære; for at this day the plaintiff shall not make title upon his own possession, unless in special case. Br. Title, pl. 18. cites 9 Aff. 10.

2. In assise, the tenant pleaded bar by custom, that the widow shall hold the whole for her life, if she remained sole; and that if she marry, the lord shall have it for her life; and that such a widow married, and he as lord entered, &c. The plaintiff said that she was seised in fee before she married the first baron; and it was awarded a good plea, without shewing title, and yet it is of her own seisin; quære at this day. Br. Title, pl. 27. cites 25 Aff. 11.

3. *Trespass* by the prior of C. upon anno 5 R. 2. the defendant said that T. D. was seised in fee, and gave to W. N. in tail, and conveyed several descents, but he did not allege any dying seised to the defendant, and gave colour to the plaintiff by him who last died; and the plaintiff said that he was seised in his demesne as of fee and of right in jure ecclesie sue, till the defendant entered where entry was not to him given by law, absque hoc that T. D. gave in tail, prout, &c. and so to issue,

issue, and found for the plaintiff, who prayed judgment; and it was pleaded in arrest of judgment, that this was no title, because it was upon his own possession, without shewing how the house came to it. And by several it was argued long, that the title was not good, and Markham Ch. J. was strong that the title was not good; but the greater number, and the best opinion was, that the title is good in this action; for it is only trespass. *Contra in assise where a man shall recover franktenement*; and after anno 4 E. 4. 17. judgment was given for the plaintiff in absence of Markham, and the action was in B. R. and Danby Ch. J. of C. B. was strong that the title is good. Br. Titles, pl. 38. cites 3 E. 4. 18.

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For more of Title in general, see Right, Toll, Traveller, Trespass, and other proper titles.

* Toll.

* Toll to the fair or market is a reasonable sum of money due to the owner of the fair or market, upon sale of things sellable within the fair or market, or for † stallage, picage, or the like.
2 Inst. 220.

(A) What is Thorough Toll.

[1. †† THOROUGH toll is properly where a toll is taken of men for passing through a vill in the high street. ‡ 22 Aff. 58. by Thorpe. Mich. 41, 42 El. B. R. in || SMITH AND SHEPHERD'S case.]

† Information against B. farmer of Newgate-market, for extortion, in taking divers sums of money of the market people for rent for the use of the little stalls in the markets, and divers great sums for fines, and was found guilty. It was held by the court of B. R. and by Holt Ch. J. at Guildhall, that if the defendant erects several stalls, and does not leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the defendant, the taking of money for the use of the stalls in such cases, is extortion. But if the people have room enough clear to themselves to come and sell their wares, but for their farther conveniency they voluntarily hire these stalls of the defendant, without any necessity compelling them, there it is no extortion, though the defendant takes a fine and rent for the use of them. The law has not appointed any stalls for the market people, but only that they shall have the liberty of the market, which the defendant does not abridge, having left them room enough besides the place where the stalls are set; and then if they will enjoy the convenience of the stalls, they must comply with the defendant's terms. *Ld. Raym. Rep. 148, 149. Hill. 8 & 9 Will. 3. The King v. Burdett.*

† S. P. So for passing public ferries, bridges, &c. 1 Sid. 454. in pl. 24. cites Blount's Law Dict. tit. Toll.

† Br. Toll, pl. 6. cites S. C. — Fitzh. tit. Toll, pl. 1. cites S. C. — S. P. And thorough toll is § against common right. Fitzh. tit. Toll, pl. 3. cites Trin. 20 E. 3. — And ibid. pl. 4. cites anno 8 E. 3. that it is where toll is taken of beasts and merchandises which pass through the vill, though they are not sold.

§ S. P. Arg. Because it is to be taken in the king's highway. *Mod. 231. in the case of James v. Johnson.*

|| Cro. E. 710. S. C.

[2. Thorough toll improperly is when toll is taken of men for passing through a vill, in a place which is not the high street. 22 Aff. 58. by Thorpe.]

Toll *Traverse*, what.

† Br. Toll, [3. Toll traverse is *properly* where a man pays certain toll for
pl. 6. cites passing over the soil of another man in a way not a high street.
S. C. † 22 Aff. 58. by Thorpe. M. 41. 42 El. B. R. in † SMITH AND
§ Mo. 574. SHEPHERD's case.]
S. C.—Cro. E. 710. S. C.

—S. P. And yet the owner of the land cannot justify the taking, unless such toll has been used to be
taken time out of mind; for otherwise he may take the beasts damage feasant. Fitzh. tit. Toll. pl. 3.
cites Trin. 20 E. 3.

S. P. So for passing *ferries and bridges* which are *private*. 1 Sid. 454. cites Blount's Dict. tit.
Toll. And toll turn is a toll paid upon return of beasts from a fair. Ibid. —Br. Toll, pl. 12.
S. P. —S. P. Br. Quo Warranto, pl. 3. cites It. Not. fol. 21. & 32 E. 3.

* [290]

4. The words *toll-thorough* and *toll-traverse* are used *promiscuously*.
Arg. And the Court seemed to agree. Mod. 232. in case of
James v. Johnson.

(B) Thorough-Toll. [Pl. 1, 2, 3. and Toll-
Traverse, Pl. 4. *In what Cases payable.*]

§ Br. Toll, [1. A Man cannot *prescribe* to have thorough-toll of men passing
pl. 6. cites through a vill in the high street, because it is against the
S. C. — common law and common right; for the high street is common
Though to all. § 25 Aff. 58. by Thorpe. M. 41. 42 El. B. R. between
toll-tho- § SMITH AND SHEPHERD dubitatur without alleging of a special
rough, consideration, as the *repairing the way*; but so he may.]
simply can-
not be claim-
ed, accord-
ing to 22 Aff. [58.] Yet when it is in consideration of *repairing a bridge*, and *pavement* of their
street, and reparation of the *sea bank*, it is well claimed; and so it is of toll-turn. Jo. 162. pl. 2.
Trin. 3 Car. B. R. The King v. the Corporation of Boston.

Toll for passing through a vill may be good; for it *may be a nearer way*, and he who has the toll is
bound to repair it. Per Holt Ch. J. Comb. 297. Mich. 6 W. & M. in case of Warrington v.
Moseley.

Toll-thorough may be by prescription, *without any reasonable cause alleged for its commencement*; for
having been paid time out of mind, the true cause of its beginning in the intendment of the law cannot
be known. Arg. and agreed to per Cur Mod. 232. pl. 21. Hill. 28 & 29 Car. 2. C. B. in case
of James v. Johnson. — 2 Mod. 143. S. C. but S. P. does not appear.

§ Mo. 574. S. C. — Cro. E. 710. per Popham, S. C.

[2. And the king cannot have such toll for passing in the high
street, as in the case aforesaid, for the cause aforesaid. 22 Aff. 58.
by Thorpe.]

[3. A man cannot prescribe to have thorough toll of men for
passing through a vill in a place which is not the high street; for it is
more than the law allows to go there. 22 Aff. 58.]

Br. Toll,
pl. 6. cites
S. C.

[4. A man may prescribe to have *toll-traverse* of men passing over
his soil in a way which is not a high street, and the prescription shall
be good. 22 Aff. 58.]

[B. 2] Toll. [How much.]

See (H).

[1.] [5. **M**IRROR of Justices, fo. 4. b. cap. 1. f. 3. it was ordained, *that fairs and markets be made in places, and that buyers of corn and beasts give toll to the bailiffs of the lords of the markets or fairs; that is to say, a halfpenny † of ten penny-worth of goods, and of less, less; and of more, ‡ more, § to the person to whom it belongs, so that no toll exceeds one penny of one manner of merchandise. And this toll was invented for witnessing of contracts; for every privy contract was forbid.*]

2 Inst. 222. cites the same book; but says,

¶ Fol. 523-

that at this day there is not one certain toll to

the market taken; but if that which is taken be not reasonable, it is punishable by this statute; and what * shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the Judges of the law, if it come judicially before them.

* [291]

† Orig. is (per lieus).

‡ Orig. is (de dire sous).

§ Orig. is (al afferant).

[2.] [6. Among the eiers of the county of Cornwall of 30 E. 1. See (D). inter placita coronæ, & infra hundredum de Keryer, (which see, with Master Bradshaw in the Exchequer,) there it is presented, that in *Helston burgh* they take *de novo de quolibet animali grosso, scilicet bove, &c. tam de emptore quam de venditoribus one penny*, where they ought to take but one penny de emptore; and that they take of all merchandize exceeding 12 d. of the buyer a halfpenny, and of the seller a halfpenny, where they ought to take but an halfpenny of the buyer. See the like there in other hundreds.]

3. The king may grant a fair, and that toll shall be paid; but it must be of a very small sum, as 1 d. or 2 d. or less *but not more*. But Mo. 474. pl. 680. S. C. the Justices held 1 d. a beast unreasonable. Per Popham. Cro. Eliz. 559. Heddy v. Wheeler, or Welhouse.

(C) Toll. For what Things it shall be paid.

[1. **O**F things bought by any for his own use, no toll shall be paid. 28 Aff. 53.] Br. Toll, pl. 7. cites S. C. per Thorp, Green, and Seton, for law.

2. De communi jure, no toll shall be paid for things brought to the fair or market, *unless* they be sold, and then toll to be taken of the buyer. *But in ancient fairs and markets* toll may be paid for the standing in the fair or market though nothing be sold. 2 Inst. 221.

Noy, 37. in Hick-
MAN's case, says, he cannot have toll if the things be

sold; and cites D. 227, 228. [But it seems mis-printed by leaving out the word (not).]

Toll may be due by custom for every thing brought to market, and for the standing of the seller there, though the things are not sold. Arg. Le. 218. in case of Lord Cobham v. Brown. — Adjudged, Mo. 835. pl. 1124. Trin. 12 Jac. HILL v. HAWKER, that a custom to take toll of corn brought into the market, but not sold, is good; but without a special custom no toll is due in such case.

3. No toll is due for *hens* or *geese*, or for many other things of such nature. Per Clench. Ow. 109. Trin. 36 Eliz. B. R. Eslet v. Lanreny.

(D) Payable. *By whom.*

The king shall not pay toll or custom. Br. Toll, pl. 9. cites 35 H. 6. 27. — S. P. 2 Inst. 221. cites S. C.

1. **NOTE**, the *king* shall go *toll-free* in all *markets and fairs*, for things bought, &c. for the king shall not be prejudiced by his grant of any liberty which appertains to his person, &c. But *quare* of toll-traverse, if he shall pay it? It seems that he shall. Fitzh. tit. Toll, pl. 5. cites 23 H. 3.

Fitzh. tit. Toll, pl. 7. cites S. C.

2. The *buyer* shall pay toll, and *not the seller*. Br. Toll, pl. 2. cites 9 H. 6. 45.

Agreed clearly. — S. P. unless it be by special custom. F. N. B. 228. (E) — Ibid. in the new notes there (b) the 2d paragraph, cites 20 E. 3. Avowry, 129. and 9 H. 6. 45. that goods of the vendor were distrained for toll.

[292] 3. If the lord or owner of the fair or market do *take toll of the seller of horses*, &c. he is to be punished within the statute W. 1. cap. 31. For he ought to take it of the buyer only. 2 Inst. 221.

(E) *Discharged.* Who and how.

Br. Action sur le Case, pl. 37. cites S. C. — S. P. Br.

1. **TENANTS** of *ancient demesne* shall be quit of toll for things sold and bought in fairs and markets, for provision of their household, and to manure their land. Br. Toll, pl. 3. cites 7 H. 4. 44.

Toll, pl. 4. cites 9 H. 6. 66. — F. N. B. 281. (E) cites * 7 H. 4. that a tenant in ancient demesne may merchandise, buy, and sell, and shall pay no toll, and says, that the same agrees with the Register.

* F. N. B. 228. (E) in the new notes there (b) says the case 7 H. 4. 44. was in trespass against A. quod telonium asportavit, & illud soivere recusavit; (it was held that the writ was good, and the first words as to the asportavit void;) the plaintiff counts that the defendant had bought 12 beasts in his market, and that he came the next market in the next week and sold 6 of the beasts (oxen), and the other 6 at the fair held there at the feast of, &c. Defendant pleads, that he is a tenant of ancient demesne, &c. and that all those tenants have been free to buy and sell beasts, for manuring their lands, &c. without toll, &c. time out of mind, and that he bought ut supra, and some he used for manuring his land, and some he put to pasture † to make grasses, and after convenient time sold them, &c. The plaintiff offers to aver, that he bought the beasts to re sell them, and that he re-sold them ut supra; the defendant demurs; but the opinion of the Court being against him, he became nonsuit; so that it seems for things bought for their sustenance, or manuring their lands, or concerning husbandry, they are discharged, but not to merchandise; and the merchandise of these is different from other merchandise, and cites 9 H. 6. 15. & 66. 3 E. 3. (Toll), 138.

† The words are (pur eux faire gros & puis able a vendre & puis apres eux vend' al faire, &c.) which is (that he put them to pasture to make them fat and more fit for sale, and sometime after sold them at a fair, &c.)

Br. Toll, pl. 1. cites 9 H. 6. 25. That they shall be discharged of toll in every fair, market, or place, for the things arising of the same tenements for selling or buying for their sustenance, according to the quantity of their tenements, as for beasts and other things necessary for their use within their house; by all the Justices. — Fitzh. tit. Toll, pl. 8. cites S. C. — F. N. B. 228. (E) cites S. C. accordingly. But says, that for other things it is a question; but forasmuch as they shall be quit of portage, murage, and passage, he conceives that they shall be quit of toll generally, although they do merchandise with their goods. — And ibid. 228. (A) says it appears that they shall be quit of toll for their goods and chattels which they merchandise with others, as well as for their other goods, for the writ is general, pro bonis & rebus suis. And it appears, that that writ may be sued by all the tenants, as a writ of monstraverunt shall be sued; and also that every particular person who is grieved, may sue forth the writ if he will.

They shall be free by their tenure of toll of all things which they sell, if it be sold upon the same soil, and of all things which they buy to manure their soil. But Br. makes a quere if they shall be free of all things which they sell and buy, &c. Br. Ancient Demesne, pl. 22. cites 19 H. 6. 66.

2 Inst.

2 Inst. 221. says, that for things coming of those lands they shall pay no toll, because at the beginning by their tenure they applied themselves to the manurance and husbandry of the king's demesnes, and therefore for those lands so holden, and all that came and renewed thereupon, they had the said privilege; but if such a tenant be a *common merchant for buying and selling of wares or merchandises, that rise not upon the manurance or husbandry of those lands*, he shall not have the privilege for them, because they are out of the reason of the privilege of ancient demesne; and the tenant in ancient demesne ought rather to be a husbandman than a merchant by his tenure, and so are the books to be intended. And herewith agrees an ancient record, the effect whereof is *quod hii qui clamant esse immunes de theolonio præstando, ut tenentes in antiquo dominico, vel per chartas regum, non debent distringi pro aliquo theolonio pro merchandis ad usus suos proprios emptis; imo pro merchandis quæ emerint vel vendiderint ut mercatores, debent solvere pro eis.*

By the custom of the realm they ought to be quit of toll, &c. in every market, fair, town, or city throughout the realm; and upon that every one of them may sue to have letters patent under the king's seal, to all the king's officers, and to mayors, bailiffs, &c. And also the tenants of ancient demesne may have a writ directed to the bailiffs, or mayor, or others, who will compel them to pay toll, *that they suffer them to go quit, &c.* F. N. B. 228. (A).

2. If lord dwells in ancient demesne in a little tenement, he shall be discharged of toll for things touching his sustenance, to the quantity of the tenement only; quod nota. Br. Toll, pl. 1. cites 9 H. 6. 25.

The lord in ancient demesne himself shall be as well acquitted of

toll throughout the realm as the tenants in ancient demesne shall be; and that * appears by the Register of an attachment sued by the lord of the manor in ancient demesne against the bailiffs of C. because they took toll of him. F. N. B. 228. (B).

* [293]

3. *Non molestando* was awarded to the mayor of Calice out of Chancery, that he shall not take toll of the tenants of D. returnable in B. R. and so *alias* and *pluries*, and no writ was returned, by which, by the opinion of the Court, attachment issued to the lieutenant of Calice against the mayor. Br. Process, pl. 181. cites 21 H. 7. 31.

4. If citizens or burghesses have been quit of toll throughout the realm by grant or prescription, and afterwards the king's officer demands toll of them, they may have a writ not to molest them, and thereupon an *alias pluries*, and attachment. F. N. B. 226. (1) 227. (A).

So if any city or borough ought to be quit of toll for the merchandises which

they buy in another town or place, if any of them be compelled to pay toll, *all the corporation may bring the writ by the name of their corporation*, and may have an *alias*, and attachment thereupon, it need be. F. N. B. 227. (E).

5. Note, if the king grants to one to be quit of toll, this does not extend to custom as it seems, nor is it any bar to a demand of toll, by them who have toll by a prior grant made to them. F. N. B. 227. (A) in the new notes there (c) cites 39 E. 3. 13. and says, see 18 E. 1. Lib. Parl. 10.

6. As well those tenants who hold of the manor which is ancient demesne in the seisin, or the possession of another man, as the tenants which hold of the manor in ancient demesne in the king's hands and possession, shall be quit of toll. F. N. B. 228. (A).

7. † Tenants at will within ancient demesne shall be discharged of toll as well as free-tenants, or tenants for life, or years of lands in ancient demesne, shall be discharged of toll for their goods, &c. F. N. B. 228. (D) cites 9 H. 6. 14.

† S. P. Br. Toll, pl. 1. cites 9 H. 6. 25. ———
Fi zh. tit. Toll, pl. 8. cites S. C.

8. If the king or any of his progenitors, have granted to any to be discharged of toll either generally or specially, this grant is good to

The king granted to

the arch-
bishop of
York the
toll of corn
sold in the
market of

to discharge him of all tolls to the king's ownfairs or markets, and of the tolls which together with any fair or market have been granted after such grant of discharge; but *cannot discharge tolls formerly due to subjects* either by grant or prescription. 2 Inst. 221.

Rippon, and afterwards the king granted to the mayor and citizens of York to be discharged of toll through the whole realm; and afterwards the archbishop exchanged his manor of Rippon with the king for another manor. It was moved, if now the citizens of York should be discharged of toll, for the grant to the archbishop was eigne to the grant to the citizens of York to be discharged of toll in Rippon. Dyer conceived that they should not be discharged, for the king had no right; and when the king grants over the manor of Rippon, the grantee shall have the toll notwithstanding the grant made to the citizens, for the grant made to them was void, as to discharge them of toll at Rippon; for the grant to the citizens shall not take effect after the exchange, for the grant was void ab initio: but if the grant of the king to the archbishop had been but for life, then the grant afterwards made to the citizens should have taken effect after the estate for life determined. And the better opinion of the Court was, that toll should be paid. 4 Leon. 214. pl. 346. Mich. 16 Eliz. C. B. York Archbishop's case. — 4 Leon. 168. pl. 273. S. R.

9. King H. 3. did grant to the abbot of L. and his successors, *quod ipsi & homines sui sint quieti ab omni thelonio in omni foro & in omnibus nundinis, &c.* and there it is resolved, that the abbot should have this privilege by force of this general grant in this manner, *quod ipsi & homines sui sint quieti a præstatione thelonii in venditionibus & emptionibus pro suis necessariis, ut in victu, vestitu, & similibus & hoc ad opus proprium ipsius abbatis & hominum suorum.* 2 Inst. 221.

[294] 10. In 16 E. 3. the king by letters patents for the considerations therein mentioned, *concessit pro se & heredibus suis to H. earl of Lancaster, and the heirs of his body lawfully begotten* (among other extraordinary grants) *that the said Earl and his heirs & omnes homines sui in perpetuum sint quieti de pavagio, passagio, paagio, lestagio, stallagio, talliagio, cariagio, pesagio, pikagio, & terragio per totum regnum, &c.* After the death of the said earl, the said patents being produced by his son and heir before the said king and council, they were declared to be the disherison of the king, and by assent of the king and council, and also of the said earl the son, were revoked, cancelled, and annulled; and it was agreed, that all patents before granted should be restored and of no force or effect. Afterwards, 25 Sept. 23 E. 3. the same king reciting the said first grant, and that the said son had voluntarily resigned the same and all right and claim by reason thereof, in consideration thereof granted to the said son all the liberties, &c. in the said first grant mentioned for his life. In replevin, tried before Mr. Justice Price at Exon assises, at which these charters were produced, there was a verdict given for the defendant, but a rule to stay, &c. in common form. And afterwards, on attending the judge at his chambers, he was of opinion, that the first charter was surrendered, and that in the 2d charter there were not words sufficient to exempt the plaintiff from the toll in question; and thereupon was entered up a nonsuit of the plaintiff, and the defendant had the costs thereof. MS. Voysey v. Tottle.

(E) *Grant good.* In respect of the Manner, &c.

1. **I**N trespass for taking a cow, the defendant justified by a grant of H. 7. of a yearly fair to the mayor, &c. of N. *cum omnibus libertatibus, & liberis consuetudinibus ad hujusmodi feriam spectantibus*, &c. and that at a fair there held, J. S. sold a cow to the plaintiff, whereupon the defendant demanded 1 d. for toll, and because he refused to pay it, he distrained the cow as bailiff, &c. Popham, Gawdy, and Fenner, delivered their opinion, that by a grant of a fair *cum omnibus libertatibus*, &c. toll was not due nor demandable, because it is *not incident to a fair*, but that it may be due if it had been granted by express words in the letters patents; Cro. E. 558. pl. 15. Pasch. 39 Eliz. & pag. 591. pl. 29. Mich. 39 & 40 Eliz. B. R. Heddy v. Wheelhouse.

Mo. 474. pl. 683. Heddy v. Welhouse. S. C. The Justices all agreed, that toll is not of common right incident to a fair, and judgment for the plaintiff. Popham said, the

case may be, that by the king's grant with such words as here, toll may pass; as where one has a fair by grant or prescription, *where toll has usually been paid, which afterwards is forfeited to the king*, who then grants it, *cum omnibus libertatibus ad hujusmodi feriam spectantibus*, now by this grant the grantee shall have toll; because toll was formerly belonging thereto, and therefore the king's grant did not grant a new fair, but the ancient one, which was not extinct by the King's possession. Cro. E. 591. in S. C. — S. C. cited Palm. 78, 79. Hill. 17 Jac. B. R. in case of the King v. the Corporation of Maidenhead; and Doderidge J. said, he well remembered it, and that he argued it at the bar. And Mountague Ch. J. said, that the parties sued in parliament to get it reversed, but that it was affirmed there. — S. C. cited 2 Inst. 220.

2. If the king grants a fair or *market, and grants no toll, he cannot after grant a toll to such free fair or market, without quid pro quo some proportionable benefit to the subject. 2 Inst. 220. cites it as resolved in the case of Northampton.

* S. P. because it was once a free market, and when once a market is

in the city, that being with a custom for a sum certain, they can never raise it but may leave it. Atg. 2 Show. 266. in case of quo warranto.

3. If the toll granted with a fair or market be *outrageous or unreasonable*, the grant of the toll is void; and the same is a free market or fair. 2 Inst. 220. cites it as resolved in the case of Northampton.

4. The king granted to the city of London, that all persons bringing into London saleable commodities, should pay so much for toll; this was held to be a good grant, and yet generally speaking, it may seem to be against the liberty of the subject. Hard. 55. [295] pl. 1. Pasch. 1656. in Scat. in case of Hayes v. Harding, cites Mich. 43 & 44 Eliz. in B. R. Hawkeshead v. Ward.

5. A grant of such toll as was used to be taken *ibi & alibi infra regnum Angliæ*, and averring payment at another place, but not there, was held ill for uncertainty. See Prerogative (F. c) pl. i. Lightfoot v. Levet.

6. It was held per 3 Just. that toll was well granted, notwithstanding that the quantity of money to be paid for toll for every thing was not expressed; but Mountague Ch. J. contra. Palm. 86. Hill. 17 Jac. B. R. the case of Maidenhead in Berks.

But Newberry, who argued for the Corporation, said, that no

judgment was given for the king in this case, but that the corporation enjoyed the privileges notwithstanding this action brought. Palm. 86. at the end of the case. And here the case argued somewhat fully.

A prescription to toll, and says not *what in certain* is void, and so is a grant from the king of such uncertain toll. Arg. 2 Show. 266. cites Palm. 79.—Agreed Arg. on the other side, that a prescription to have a toll uncertain, and as often as occasion requires to ascertain it, is ill. But that in London it is good, though it would be so no where else. 2 Show. 273. Hill. 34 & 35 Car. 2. B. R. in case of the Quo Warranto v. the City of London.

7. The king cannot grant a toll *for things not brought to market* to be sold. 2 Lutw. 1502. per Powel J. in case of Kirby v. Whichelow.

(G) Toll. Due in what Cases, and how.

1. A Man cannot justify for toll of *waggoners* (charretours), &c. nor for toll *for passing of men* by land or by water, *unless by usage* or prescription. And Thorp said, that a man cannot justify it by grant of the king, but may have toll by the king's grant of such as buy in his fair or market. Fitzh. Tit. Toll, pl. 2. cites Hill. 50 E. 3.

• S. P. Or may be by grant, but toll-through cannot be by either grant or prescription. F.N.B. 227. (A) in the new notes there (c) cites S. C. and 20 E. 3. Toll, 3.

2. Toll-traverse lies in * prescription, but not toll-through; for it is an oppression of the people. F. N. B. 226. (I) in the new notes there (b) cites 22 Aff. 58. and says, yet see a common person may prescribe for toll-through, if he shews a *reasonable cause*, and proves that the country has a recompence; and cites 14 E. 3. Bar. 275. 5 H. 7. 10. and so the king may prescribe for toll-through; quære if without shewing cause, and cites 11 H. 6. 39.

Fitzh. Tit. Toll, pl. 7. cites S. C.

3. A man by law shall not pay toll *for any thing brought to a fair, but for things sold*; but by custom he may pay *for every thing brought to the fair, and he shall pay for his place*, viz. his standing, though he sell nothing. Br. Toll. pl. 2. cites 9 H. 6. 45.

4. Note, toll-through is in the highway, but toll-traverse is for passing over another's land; yet it seems if a *highway be in a city or town, toll-through may be there by prescription*. F. N. B. 227. (A) in the new notes there (c) cites 5 H. 7. 10. 13 H. 4. 15. And pontage, murage, or ferry, may be demanded in a highway by the king's grant, but not in a private way; and cites 13 H. 4. 15. and says, see there that the king may grant tronage, and good.

5. No toll is due either *on the part of the lord*, when he has a fair or market, and not any toll, *or on the part of the market-man who ought to be discharged of toll, or of the thing sold that is not tollable*. 2 Inst. 220.

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† By special custom toll may be due, though the party doth not sell. Arg. 2 Bulst. 202. cites 9 H. 6. 45.—Ibid. 204. Per Coke

6. No toll for any thing tollable brought to the fair or market to be sold, shall be paid to the owner of the fair or market *before the sale* thereof, *unless* it be † *by custom* time out of mind used, which custom none can challenge that claim the fair or market by grant within the time of memory, viz. since the reign of king R. 1. which is a point worthy of observation, for the suppression of many outrageous and unjust tolls incroached upon the subject, to be punished within the purview of this statute. So note, it is better to have a fair by prescription than by grant. 2 Inst. 221.

Ch. J. Pasch. 12 Jac. in the case of Hill v. Hanks, alias Hawks.—S. P. Agreed; but that cannot

cannot be where the corporation is created within time of memory. 2 Lutw. 1336 Trin. 2 Jac. 2
Leight v. Pym.

7. Toll is not of common right incident to a fair, and none shall have toll in a fair, unless he has it by grant or prescription. Cro. E. 558. pl. 15. Pasche 39 Eliz. B. R. S. O. adjournatur. S. C. Mo. 474. pl. 680. Mich. 39 & 40 Eliz. B. R. Heddy v. Well-house.

adjudged Cro. E. 591. pl. 29. Mich. 39 & 40 Eliz. B. R.

8. The owner of a port may have toll by prescription, without alleging any consideration, said by Treby Ch. J. 2 Lutw. 1523. Pasch. 12 W. 3. in case of WILKES v. KIRBY, to have been so held in the case of PRIDBAUX v. WARREN; but because in the principal case the defendant had taken upon himself to allege a consideration, it was left a quære, supposing the consideration not to be well alleged, whether the plea be then good.

(H) How much. Punishment of taking more than due. See (B. 2) 4

1. 3 Edw. 1. ENACTS, That touching them that take * outrageous toll against the common usage of the realm † in market towns, if any do so in the king's own town which is let in fee farm, the king shall ‡ seise into his own hand the franchise of the || market. In the troublesome and irregular reign of H. 3. outrageous tolls were taken

and usurped in cities, boroughs, and towns, where fairs and markets were kept, to the great oppression of the king's subjects, by reason whereof very many did refrain from the coming to fairs and markets, to the hindrance of the common wealth; for it has ever been the policy and wisdom of this realm, that fairs and markets, and especially the markets, be well furnished and frequented. 2 Inst. 219.

* That is, where a reasonable toll is due, and excessive toll is taken, or where no toll at all is due, and yet toll is unjustly usurped; for it is an outrage to do such a common injury and wrong. Sometimes it is called superfluum vel indebitum, vel injustum. 2 Inst. 220.

† This is, in a city, borough, or town of merchandise, where fairs and open markets are kept for merchandising, and buying and selling. 2 Inst. 220.

‡ That is intended of toll to the fair or market. 2 Inst. 220.

§ That is, shall seise the franchise of the fair or market until it be redeemed by the owner. But this is intended upon an office to be found; for in statutes, incidents are ever supplied by intendment. 2 Inst. 222.

|| This word here includes as well a fair as a market; for forum, from whence fair is derived, signifies both; and a mart is a great fair holden every year, derived a merce, because merchandises and wares are thither abundantly brought; and mercatus is derived a mercando. 2 Inst. 221.

And if it be another's town, and the same be done by the § lords of the town, the king shall do in like manner; and if it be done by a bailiff without the command of his lord, he shall render to the plaintiff as much again for the outrageous taking as he had taken from him, and shall have 40 days imprisonment. § That is, the owner of the fair or market. 2 Inst. 22. Fleta collects the effect of this former part of the act in these words, inhibiturum est ne quis in villis regis merchandiis, quæ dimissæ sunt & commissæ ad feodi firmam, indebita & injusta capiat thelonia; quod si quis fecerit extunc eo ipso capiat rex libertatem mercati in manum suam; eodem modo facit rex, licet in alterius villa præmissa fieri contigerit, si balivus hoc fecerit sine voluntate domini sui, reddet tantum querenti quantum cepisset balivus ab eo, si tolletum asportasset, & nihilominus habeat prisonam 40 dierum. 2 Inst. 222.

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Touching citizens and burghesses, to whom the king or his father has granted † murage to enclose their towns which take such murage otherwise. * [297] † Murage a muro, as our wise

est does not *wife than it was granted, and of this are attain, they shall + lose*
plain it, to *their grant for ever, and shall be grievously amerced.*
wall in or

inclose with wall a town, under which word is here included a city and burgh. It is a reasonable toll to be taken of every cart, wayne, horse laden coming to that town, for the inclosing of that town with walls of defence, for the safeguard of the people in time of war, insurrection, tumults, or uprears, and is due either by grant or by prescription. But if a wall be made which is not defensible, nor for safeguard of the people, then ought not this toll to be paid; for the end of the grant or prescription is not performed. 2 Inst. 222.

He that has burghbote granted to him, is discharged of murage granted afterwards; and although murage be here particularly named, yet there are grants of like nature within the purview of this statute, as pontage, paviage, keyage, &c. 2 Inst. 222.

† Here the whole franchise is forfeited; and so note a diversity between the words (*shall lose the franchise, &c.*) and the words (*shall lose the grant*) the one implying a seizure, as has been said, and the other a forfeiture for ever; for it is a misuser or abuser. And thereof Bracton says, *hujusmodi utrum libertates, &c. Statim quasi transferantur, & quasi possidentur, &c. donec amiserit per abutum, vel non usum.* 2 Inst. 222.

Fleta renders this last part of this chapter in these words: Item qui muragium ad villam claudendam gravius ceperunt, quam concessum fuerit per cartam regis, perdant extunc gratiam suae concessionis & graviter amercentur. And presently after the making of this act, the effect thereof for justices in eyre to inquire of it, was inserted in the chapters or articles of the Eyre, in these words, Item de his qui ceperunt superflua, vel indebita tolmeta in civitatibus, burgis, vel alibi contra communem usum regni. Item de civibus & burgenfibus qui de muragio per dominum regem eis concessio, plus ceperunt quam facere deberent secundum concessionem domini regis factam. 2 Inst. 223.

The Mirror says, touching murage, thus, Le point que voet que ceux que misusent murages les perdent ne fuit mistier daver estre, car ley voet que chescun perdra son franchise que misusera; so as this statute was made in that point for 2 purposes, viz. to affirm the common law, and to add a further punishment, viz. to be grievously amerced. 2 Inst. 223.

(I) Remedy.

It was
agreed on
all sides

that if toll be due, a distress may be taken for it. Cro. E. 558. pl. 15. Pasch. 39 Eliz. B. R. in case of Haddy v. Wheelhouse.

1. **A** *Distress* is incident to every toll. Noy, 37. in Hickman's case, cites 30 E. 3. 20.

2. The party has no remedy for the toll, if the goods are *carried out of his jurisdiction*. Noy, 37. in Hickman's case, cites 20 H. 7.

Br. Toll,
pl. 5. cites
S. C.—In
case the
plaintiff de-
clared of a
toll-traverse,
for passing
over the
bridge at
Ware; and
that the de-
fendant had
carried so
many loads
of barley
over that

3. Action upon the case was brought by the mayor and burgesses of Gloucester, against the burgesses and commonalty of B. because they *have used, time out of mind, &c. to have toll of every boat which passed the water of Severne by the vill of Gloucester with any merchandise, &c.* and that the defendant *passed with a boat and 20 pipes of wine, and did not pay toll, where they ought to pay for every pipe 3d. for toll, &c.* Marowe, of counsel with the defendant, said, that if a man passed over land which ought to have the toll, and the other did not distrain for the toll in his land, but *permitted him to pass without payment or distress*, he shall not have action of toll. Quære inde. Br. Action sur le Case, pl. 70. cites 20 H. 7. 16.

bridge; that the toll thereof, at so much per cart, amounted to 40 l. which the defendant refused to pay, &c. Upon a demurrer it was insisted, that an action would not lie for a toll-traverse for passing through the highway without shewing a title, and consideration. Besides this action was brought for a non-feasance, (viz.) not paying, &c. for which (if any thing is due), an action of debt, and not on the case, should be brought. But on the other side it was answered, that an action lies * without shewing a title or consideration, and that this shall come upon the evidence; and as to the non-feasance, many cases were cited to shew that case lies for non-feasance. But adjournatur. 3 Lev. 400. Trin. 6 W. & M. in C. B. Steinton v. Heath.

† See Actions, (K. c) pl. 2.

4. If a man ought to have toll in a fair, &c. and his *servants* are *disturbed to gather* the same, he shall have trespass vi & armis for assault of his servants, and for the loss of their service, and for the disturbance made unto them, and for losing the profit of his toll, and all in one writ. F. N. B. 91. (A).

5. An *ox hide* was brought into Leadenhall-market, on the market-day, and sold, and the bailiff of the mayor, &c. of London, and by their command, took it there *damage feasant*. But it was agreed by all, that this ox hide, brought into the market and sold, cannot be distrained damage feasant. Cro. E. 627, 628. pl. 21. Mich. 40 & 41 Eliz. B. R. Sawyer v. Wilkinson.

6. A customary toll was of 5d. a chaldron of coals. And it was insisted, that a *distress* ought not to be on any thing, but on that commodity out of which the toll was payable. But the anchor and cable, and sails, being distrained, it was adjudged that they were well taken. Carth. 357. Trin. 7 W. 3. Vinkinstone v. Ebdon.

1 Salk. 242.
S. C. ad-
judged ac-
cordingly.—
5 Mod. 359.
S. C. argu-
—12 Mod.
216. Mich.
10 W. 3.

S. C. by the name of Winckelline v. Ebdon, adjudged accordingly.

7. If A. has a market and toll, and B. is coming with goods to the market, for which, if sold, toll would be due, and C. *binders B. coming to the market*, the lord of the manor may have an *action* because of the possibility of damages. Per Powell J. 6 Mod. 49. Mich. 2 Ann. B. R. in case of Ashby v. White.

S. C. cited
Arg. Gibb.
174. as in
case of fore-
stalling,
whereby toll
is lost.—

Per Wild J. 2 Vent. 26. in case of Turner v. Sterling.—Ibid. 27. per Tyrrel J. accordingly.—
Ibid. 28. per Vaughan Ch. J. accordingly.

8. An *indebitatus assumpsit* was brought for toll. It was objected that this action would not lie for toll, but the only remedy was distress. But the Court inclined to think it would, if the corn is the duty; but gave time to move this and other exceptions at another time. Afterwards the matter was moved again, and the rule for staying judgment was discharged. 2 Barnard. Rep. in B. R. 243. Pasch. 6 Geo. 2. and 484. Hill. 7 Geo. 2. Cock v. Vivian.

(K) Writ and Declaration. Good or not.

1. **TRESPASS** by the vicar against A. that where he and his *predecessors* ought to grind without toll, there the defendant has taken toll, vi & armis, viz. of one quarter of rye, and one quarter of corn, and of all the corn that he ground there, from such a day to such a day. The defendant said that he is only a servant; judgment of the writ; et non allocatur; and the writ was awarded good vi & armis, by which he pleaded to the writ, because the plaintiff has not alleged the price of the toll; et non allocatur, because he has pleaded more high before. By which he traversed the prescription, and prayed aid of the tenant for life, to whom he was deputy; quod nota. Br. Trespass, pl. 47. cites 44 E. 3. 20.

Br. Brief,
pl. 113. cites
S. C.—S. P.
Br. Action
sur le Case,
pl. 37. cites
S. C. by
which the
defendant
justified as

2. The action was for non-payment of toll; *quod acclonauit asportavit & illud solvere recusavit*. Whereas toll, not paid, cannot be carried away; and therefore *asportavit* is false. And notwithstanding that this be void * or surplusage, yet because the other word *solvere recusavit* are sufficient, therefore the writ awarded good, and yet false, repugnant, and surplusage; quod nota. Br. Nugaton, pl. 9. cites † 7 H. 4. 44.

tenant of *Wensbury*, which is ancient demesne, by the custom of ancient demesne, to go quit of toll for beasts to manure their land or [maintain their] houses, sold or bought; by which he bought 8 beasts, with part whereof he manured his land, and the rest he fed to sell. Judgment, &c. And the plaintiff said, that the defendant was a common merchant, and sold and bought every day for profit; and the defendant demurred in law; and as to the other beasts he bought them one day, and sold them next day, and so merchant. And the defendant demurred in like manner. And the opinion of the Court was with the defendant, and the plaintiff was nonsuited. Brooke says, quære why, and whether the opinion was only for the last plea, or for both; for, upon the first plea, it seems the law is with the plaintiff, unless this buying for pasture and sale be one kind of manurance and pasture-land. Quære.—Br. Toll, pl. 3. cites S. C.

† S. C. cited by Coke, 2 Bulst. 228. in case of *Willamore v. Bamforde*; for the rule is, *utile per inutile non vitiatur*.

Br. Toll,
pl. 2. cites
S. C.—
F. N. B. 91.
(G) in the
new notes
there (b)
says, it seems
that the
name of the
buyer, as also
of the thing sold,
for which the toll is due,
ought to be shewn in the count;
and cites S. C. but adds
quære.

3. *Trespass for hindering him from taking the profits of his fair in S. viz. pro uno equo vendito 4d. for toll*. And because he did not shew of whom the buyer bought the horse, therefore ill, by the opinion of the Court; for the buyer may have notice of the name of the vendor. Contra in an action of wreck, or against an hostler. But where he justifies the buying of a horse in market overt to change the property, he shall shew of whom he bought. Br. Count, pl. 78. cites 9 H. 6. 45.

Br. Toll,
pl. 5. cites
S. C.

4. If a man prescribes to have toll of every boat which passes by the will of B. he ought there to count upon what water, by name, the boats were passing. Br. Prescription, pl. 92. cites 21 H. 7. 16.

Clench took
another ex-
ception; be-
cause he did
not set forth
that toll was
to be paid of
wool by
common
usage, for no
toll is due
for hens or
geese, or for

5. In case the plaintiff declared of a lease for years of the toll, and profits of the markets and fairs, within the manor, &c. of T. and that the defendant disturbed him in taking divers pieces of wool; it was objected against this declaration, that the plaintiff did not shew that his lessor was seised at the time of the demise. Sed non allocatur; for the plaintiff, in this action, is to recover damages only, and the right or title of land is not in question. But contra, if it were in such action in which the right of the toll had come in debate. Ow. 109. Trin. 36 Eliz. B. R. Escot v. Lanreny.

many other things of such nature, and so it might be that toll was not due for wool. Fanner was of the same opinion; but Popham contra, who said, that the plaintiff had declared, that the defendant had disturbed him from the toll of divers pieces of wool; and by that is implied, that toll ought to be paid for wool. And at another day judgment was given for the plaintiff. Ow. 109. Escot v. Lanreny.

6. A claim in quo warranto, to have toll in specie of grain exported to sale, whether sold or not, *ratione manerii* was adjudged to be ill, because it ought to have been *ratione mercati*. Noy. 37. 41 Eliz. Hickman's case.

7. In action sur le case against the town of Uxbridge, for taking toll of a Thursday market there. The plaintiff made title by con-

conveyances under the lord Derby, to whom it was granted heretofore, and allowed in 38 H. 8. and 8 Car. 1. in 2 several quo warranto's, and the town disclaimed. Twisden J. excepted, because in the count it was *not said by grant or prescription, but on a seisin only.* 3 Keb. 12. pl. 16. Pasch. 24 Car. 2. B. R. Cook v. Baker.

8. In case, the plaintiff set forth, that the *city of Norwich has a common wharf and crane, and a custom that all goods brought down the river, and passing by, shall pay such a duty.* It was objected, that this is for toll-thorough, which is malum tolnetum. Twisden said, that * if they had unladed at the key, or at any other place in the city, they should pay the whole duty; or if he had set forth, that they had cleansed the river. It was ordered to stay. 1 Mod. 47. pl. 103. Hill. 21 and 22 Car. 2. B. R. Haspurt v. Wills. * [300]

Vent. 71.
Pasch. 22
Car. B. R.
S. C. it was
alleged, that
they main-
tained a
common
key for un-
lading goods,
and held a

void custom as to such vessels as did not unlade at the key, or elsewhere in the city; but if they had received their freight at the key, it might extend to them.—Sid. 454. HESHORD v. WILLS, S. C. that it was debt brought on a by-law, to have so much a tun for goods passing upon the river; and that the plaintiff had judgment in C. B. But that upon error brought in B. R. the same was held to be error.

9. When toll is *claimed generally*, it shall be *intended toll-thorough.* Per Atkins J. Mod. 232. in case of JAMES v. JOHNSON, and said that so is the case in Cro. E. 710. Smith v. Shepherd.

(L) Pleadings.

1. **A** Man cannot prescribe *in the negative to pay no toll, but in the negative with an affirmative, viz. that he and all, &c. have used to buy and sell, &c. without paying toll.* Br. Prescription, pl. 17. cites 7 H. 6. 32. and 8 H. 6. 3. Per Paston. Br. Custom, pl. 23. cites S. C.—The pre-
scription
ought to be
in the affirmative, viz. to be quit of toll, and that he had not paid toll. F. N. B. 227. (1) in the new notes there (a) cites 14 H. 6. 12.

2. If a man prescribes to be quit of toll, he ought to *shew how it has been allowed and put in ure; quære.* Br. Patents, pl. 27. cites 14 H. 6. 12. Per Vamp.

3. Trespass against him for taking a quarter of corn, he justified for that it was within the town of L. and it was *damage feasant* in his freehold; the defendant pleads that they were by charter in the time of queen Mary incorporate, &c. and a market was granted to them, and the *place where, &c. was appointed for the market place*, and he brought his corn on the market-day, and set it there, and the defendant took it; and upon demurrer it was adjudged without argument, that upon this matter the mayor could not justify the taking. Cro. E. 75. pl. 34. Mich. 29 & 30 Eliz. B. R. The Mayor of Lawson's case. Cro. E. 117. pl. 2. Mich. 30 & 31 Eliz. in the Exchequer-chamber, KINGDON v. BARNES, seems to be S. C. but differently stated, as if the action had been

brought in right of the patentee, for taking away the corn which he had distrained damage-feasant; and says the defendant justifies as for his proper goods, and pleaded a special justification, that the plaintiff made title to them by seizure, and pleaded that king P. and queen M. by letters patents inrolled in Chancery, *dederunt & concesserunt villa de Launceston liberty of a market, &c.* and shews a special cause of

or seizure as an officer there; whereupon it was demurred, and judgment for the plaintiff. And now upon error brought the error assigned was, that he pleaded that the king and queen granted by letters patents, &c. but did not say (*sub magno sigillo confectas*), and this was clearly held an error; for if the grant was not under the great seal, it is not good, and the saying it was enrolled in Chancery is not sufficient; for any patent may be enrolled there. And therefore the judgment was reversed.—10 Rep. 94. b. S. C. cited in Dr. LEYFIELD'S CASE; and there the Court said that the error assigned in the mayor, &c. of LAUNCESTON'S CASE, was the want of a *proferat hic in curia* of the letters patents; and that it was resolved that for this cause the plea was insufficient in substance; and therefore resolved by all the Justices of C. B. and Barons of the Exchequer, that the judgment be reversed.

[301] 4. In trespass for taking an ox-hide, the defendant justifies that the mayor, &c. of L. was seized in fee of, &c. and that it was damage feasant, and therefore he took it by command of the mayor of L. as bailiff. The plaintiff replied, that the place where, &c. is a market, and that he on a market day bought the hide in the market of one W. B. and delivered it to J. S. to carry away, who put it in a basket; and in carrying it away on his shoulders from the market, the defendant took it away, &c. which he is ready to aver, &c. Defendant demurred, 1st, Because having justified damage feasant, the plaintiff's replication shews this matter to take from defendant his authority for the taking, whereas the plaintiff varies from the manner of the taking, and does not conclude *quæ est eadem*, &c. 2dly, Because defendant justifies for a taking, which is intended upon land damage feasant; but the plaintiff's replication is of another, and does not traverse; sed non allocatur; for the plaintiff shewing the special cause of the hide's being there, and that therefore the defendant had colour to take it, but that by reason of the matter in law which he shewed, his taking was not justifiable, it seems that the replication was good, and needs no traverse; and that the conclusion of the plea, *quæ est eadem transgressio*, is not requisite, he having agreed in the time and place of the caption, but shews cause why it is not distrainable. But Popham held that the plaintiff ought to have traversed, because he does not agree in the manner of the caption; but Gawdy and Fenner e contra, because it is his matter in law. Adjudged for the plaintiff. Cro. E. 627, 628. pl. 21. Mich. 40 & 41 Eliz. B. R. Sawyer v. Wilkinson.

Cro. E. 710. pl. 34. S. C. says that the exception that the prescribing to distrain the sheep in via regia for the toll was not good, because it was against the statute of Marlbridge, was not allowed; for that this statute intended only distresses for rents and

5. Trespass for taking of his sheep, the defendant justified as servant to the lord B. by prescription to take 2d. for every 20 sheep passing per ~~et~~ trans the vill; and if it was denied upon request, to detain one sheep of every 20 till payment. Upon demurrer it was adjudged for the plaintiff, because the prescription was not good to take toll for passing in via regia; for that the inheritance of every man for passing in the king's highway is precedent to all prescriptions; but if the party shews cause for the toll, as if he is bound to repair a bridge or causeway, &c. This would be good, but no such is shewn here; but it is clear that a man may prescribe for toll traverse, because it is a passage over his own freehold, but not so for toll-thorough. Besides, the defendant should have shewn that the sheep were passing through the town before he took the distress, otherwise it does not suit with the prescription to distrain them. Mo. 574. pl. 793. Trin. 41 Eliz. Smith v. Shepherd.

services, and not such things of which no distress can be put in the highway. And exception being taken, because the custom was alleged to be, that if the sheep of any foreigner be driven through, a toll shall

the toll; and if denied by any foreigner that drives them through, a distress may be taken, and it is not averred that he who drove them through was a foreigner, but only that the master was a foreigner: Sed non allocatur; for the driving of the servant is the driving of the master, and if he be a foreigner it suffices. Another exception was, because he justified quod cepit & abduxit, and says not by distress, minus districtionis; for that he cannot otherwise justify. This per tot. Cur. was held a material exception, because without that it does not meet with the prescription. Popham thought toll-traverse and toll-thorough might be by prescription, but that it ought to be for some reasonable cause which must be shown, but no such being alleged here, he conceived the plea ill. Gawdy and Clench held the plea well enough notwithstanding, because being by prescription, the cause cannot be intended to be known; but since it might have a lawful beginning, it is well enough without shewing it; but Gawdy doubted upon the reason of 22 Aff. 58. whether such toll might be claimed by prescription: Fenner delivered not any opinion herein. But for default in the pleading it was adjudged for the plaintiff.

6. In trespass for taking a cow, the defendant justifies that the bishop of D. had a fair by letters patents with toll, and that the plaintiff *sold certain hides*, and the defendant demanded 1d. for toll, which the plaintiff denied, and thereupon he distrained. The plaintiff *replied*, that it was *ancient demesne* in which he distrained, which is found against him. Jones moved in arrest of judgment, that the justification was ill; for toll is against common right, and here is *no grant or prescription laid for distraining*; judgment stayed per Curiam, had not a non prof. been before entered. 1 Keb. 342. pl. 14. Mich. 14 Car. 2. B. R. Harris v. Hawkins.

7. Trespass of taking, cutting, and spoiling so many yards of cloth, the defendant justified as to the taking by *prescription to take a reasonable sum for stallage, and that 5s. was a reasonable sum*; the plaintiff demurred, because this was [not] to distrain only, but to take and keep the goods until the sum is paid. 2dly, It is not said certainly what, but a reasonable sum; nor, 3dly, shewed how 5s. was a reasonable sum, that the Court may judge it so; but per Twisden J. the prescription for a reasonable sum is as sufficient as for fine of copyhold, without shewing what sum; for this is issuable: but the justification of *the taking at the place agreed, and carrying to another out of the county, should be traversed*; and judgment for the defendant nisi; for it cannot be said quæ est eadem. 3 Keb. 722, 723. pl. 7. Hill. 28 Car. 2. B. R. Ricroft v. Roberts.

8. In trespass for taking his cattle, the defendant justified by *prescription to have toll for all beasts driven over the manor of B.* A special verdict found that the manor, &c. was parcel of the possessions of the priory of B. that the prior had such a toll by prescription as appurtenant to the manor; that by the dissolution it came to the crown, and so to J. S. in whose right, and as servant to him, the defendant justified; and conclude, that if the defendant may claim by a que estate, then they find for him, if not, then for the plaintiff. It was argued, that toll may be appurtenant to a manor, as well as any other profit apprender; and for the que estate, though a thing which lies in grant cannot be claimed by a que estate directly by itself, yet it may be claimed as appurtenant to a manor, by a que estate in the manor. And to this the Court agreed, and gave judgment for defendant. Mod. 231. pl. 21. Hill. 28 & 29 Car. 2. C. B. James v. Johnson.

9. If defendant prescribes toll for passing the highway, he must shew some cause to intitle himself to the taking of it, as by doing something of public advantage. Admitted Arg. 2 Mod. 144. Hill. 28 & 29 Car. 2. C. B. in case of James v. Johnson.

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2 Mod. 143. S. C. and it was said that this toll is not become a toll in gross by the dissolution; and judgment for the defendant.

10. In

2 Show. 34
pt. 26.
Pasch. 31
Car. 2. B.R.
A. C. by the
name of
HILL v.
PRIOR,
the Court
said that the
queen's par-
ticular in-
terest is not
recited at all;
and Pembro-
ton said it
had been
good, if ge-
neral with-
out recital,
because it
would and
should have
passed what
the queen

had, but here it refers to king John, and he never had this. Scroggs said, the queen only passed those tolls which belonged to the kings of England, particularly which king John had, and not those which came to her since, and by another means; to which the rest agreed, and judgment was given for the defendant.

10. In trespass for taking a bushel of oatmeal, the defendant as to all besides one quart, pleads not guilty, and as to that he justified for toll in the market at Penzance, and made a title to the market and toll by prescription, &c. The plaintiff replied that before the defendant had any thing in it, &c. queen Eliz. was seised of the market, and by letters patents, reciting that R. 1. and K. John had granted to the borough of Hilston, that it should be a free borough, and quit of toll, of pontage, passage, stallage, and fallage through all Cornwall; she incorporated the said borough, and preserved to them all the said recited privileges. Then he sets forth, that he was born in, and a free burgess of Hilston, and so exempted. The defendant rejoined, &c. that the burgesses of Hilston had always paid toll; and upon demurrer the Court said, it was a doubt whether this toll be within the word fallage, or any other particular word of discharge, and that the word *theolonium* will not extend to all the particulars after mentioned. And their opinion was, that the charter of Q. Eliz. did not discharge the plaintiff, and so gave judgment quod nil capiat. 2 Jo. 118. Gill v. Prior.

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11. In trespass for taking 4 bushels of wheat at 4 several days, (viz.) 2 in the market-place in Lanceston, and 2 more in the house of J. S., &c. The defendant as to all but 16 pints, pleads not guilty, and as to these actio non, and justifies as servant to the mayor and commonalty of Lanceston, and by their command, &c. for toll in the said market; and that he took the 16 pints at two several markets, (viz.) 12 pints for 12 bushels exposed to sale, &c. and 4 pints for 4 other bushels, &c. *quæ est eadem captio*. Plaintiff demurred, because the taking in the several places mentioned in the declaration are not answered severally, so that it might appear whether the pints of corn were taken in or out of the market; for though the taking may be justified in a market, yet it cannot be justified out of it: sed per Curiam, the plea is good; for it is sufficient for the defendant to answer the taking in the vill, and the very place where taken is not material in trespass, as it is in a replevin; and had the taking been out of the market, the plaintiff ought to shew it. And judgment quod nil capiat. 2 Jo. 207. Pasch. 34 Car. 2. B. R. Specot v. Carpenter.

12. In trespass for taking his corn, the defendant justified for toll, but did not set forth that the corn was sold; and exception being taken for this reason, because none can otherwise be due, unless by special custom, judgment was given for the plaintiff. 2 Lutw. 1329. 1336. Trin. 2 Jac. 2. Leight v. Pym.

13. Trespass for taking two lambs at F. the defendant pleads in bar a grant of 2 fairs to W. R. and his heirs, to be held every year in F. with all tolls, &c. to these fairs belonging, &c. That a fair was held there 5 Aug. &c. and that the plaintiff bought 600 sheep and lambs, for which 6s. became due for toll, of which he gave notice; but he refusing to pay it, the defendant, as servant

to W. R. distrained the two lambs for toll, and took and carried them away, which is *residuum transgressionis*, &c. The plaintiff replied, that he was inhabitant in T. within the duchy of L. and so prescribed to be quit of toll, and that he gave notice to the defendant. Upon demurrer it was objected, that no toll was expressly granted, and therefore none is due by law. The grant is (as belonging, or accustomed to the fair) which cannot be by prescription, which ought to be averred. 2dly, For that the defendant set forth, that he did take and carry away the lambs for the toll not paid, but did not say *nomine distractionis*, as was resolved Cro. E. 710, 711. in SMITH AND SHEPPARD'S case; but in this case it was said that he distrained the lambs for toll. But admitting the plea good, the Court were of opinion, that the prescription for inhabitants to be quit of toll is good, and so the replication and count being good, though the bar was not, the plaintiff ought to have judgment, and so he had for this reason. 2 Lutw. 1377. Pasch. 4 Jac. 2. Osbuston v. James.

14. Trespass for taking deal-boards; the defendant prescribes to repair a wharf, and *ratione cuius* to have a toll of 2d. per tun of all merchandize landed within the manor, (but did not say upon the wharf,) and for non-payment to distrain a reasonable part of the goods. The plaintiff replied *de injuria sua propria*, and traverses the prescription; upon which they were at issue, and there was a verdict for the defendant; and now it was objected that this prescription was void, because without any consideration, it being for landing goods on the manor, and not on the wharf; so that this is as a toll-thorough, and without consideration, and not good. But the Court held, that *this is rather toll-traverse than toll-thorough*, and gave judgment for the plaintiff. 3 Lev. 424. Trin. 7 W. 3. C. B. Crispe v. Belwood.

15. In trespass, &c. the defendant prescribed for a fair every year on such a day, to be held in the place where, &c. and to have reasonable toll, (viz.) *inter alia*, one shilling for every double or large stall, and for the ground near it and about it. Upon issue joined, the defendant had a verdict. It was moved in arrest of judgment, that toll could not be due for stallage, for they are different things. Sed non allocatur; because *tolnetum* may well signify stallage, as a general word for all such duties and payments. 2. It was objected that the defendant had prescribed for toll, *inter alia*, (viz.) 1s. for a large stall, which is uncertain; and since the prescription is in-
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tire, the duty ought to be so too. Sed non allocatur; for the defendant need not set forth more than what the present occasion required. 3dly, The words *near and about the stall* were objected as uncertain and void. Sed non allocatur; for this shall be ascertained by the common usage of the fair. And judgment, per tot. Cur. for the defendant. 2 Lutw. 1517. Pasch. or Trin. 12 W. 3. C. B. Bennington v. Taylor.

16. In trespass of goods taken, the defendant justifies, that R. Bishop of W. was seised in C. of a market in C. and that he, as bailiff, distrained them *damage feasant*. Plaintiff replied, a grant by letters patent to J. late Bishop of W. and alleges, that he brought
the

2 Ld. Raym.
Rep. 1589.
S. C. by
name of
WIGLEY v.
PEACHY &

al. adjudged accordingly by Raymond Ch. J. Page, and Probyn, (Lee absente.) And says it was never moved again.

† 2 Roll's Abr. Market, (B) pl. 1. Mich. 15 Jac. B. R. NUMGTON FAIR'S CASE. And says, that Doderidge was a contra at a day before.

the goods into the market for sale, when the defendant took them of his own wrong. The defendant, by his rejoinder, craved oyer of the patent, and said, that plaintiff did not pay toll, and therefore defendant desired him to remove his goods; which not being done, he distrained them, &c. Plaintiff demurred, because defendant demanded oyer of the patent, which was not pleaded with a profer; that he did not allege, that any toll was due, nor for what, or in what manner, nor that any was denied; and that the rejoinder is a departure from the bar. The defendant's counsel agreed, that the rejoinder could not be maintained: but said, that the replication admitted his bringing the goods for sale into the market; but that plaintiff, before his doing so, should have tendered stallage to the lord's bailiff; and cited † 2 Roll's Abr. 123. relating to the town of Cambridge. But the Court declared, they were by no means satisfied that toll or stallage was due to a market, without any express clause in the grant, or prescription for that purpose; but if these duties were incident to markets of common right, they thought that stallage could not be necessary to be tendered before the goods were brought into the market; and that it was enough to do it after they were brought in. And as to the case cited out of 2 Roll's Abr. 123. the Ch. J. and Judge Page declared, that they doubted whether it was law. Accordingly judgment was given for the plaintiff, unless cause, on Thursday next. 2 Barnard. Rep. in B. R. 161, 162. Trin. 5 Geo. 2. Bigley v. Pechey.

(M) Verdict.

1 Salk: 248. pl. 4. S. C. but S. P. does not appear. — 12 Mod. 216. Mich. 10 W. 3. S. C. by name of Wincklesline v. Ebdon. But same point does not appear.

1. **I**F it be found, that the corporation, &c. are bound to repair, &c. the thing, on account whereof the toll is to be paid, it is sufficient, without finding that it was then in repair; for it is the obligation which lies on them to do the thing, and not the performance of the thing itself, which is the consideration of the duty; per Holt Ch. J. And judgment accordingly. Carth. 359. Trin. 7 W. 3. B. R. Vinkinstone v. Ebdon.

See Market, (1. 4).

(N) Toll-Book.

Ow. 27. S. C. accordingly by Windham and Rhodes, — If

1. **A**. Stole a horse, and sold him in market overt; but he entered a false name in the toll-book. This does not alter the property of the thing tolled. Le. 158. pl. 225. Mich. 31 Eliz. C. B. Gibbs's case.

one takes my horse, and sells it in a market overt, and pays toll for it, though he enters his name falsely in the toll-book, yet the sale is clearly good, and the property altered, if there was no fraud in the vendee. For the misnomer of the party is nothing to him, when he buys it bona fide, and is not confusant of the tortious taking. And they advised the plaintiff to discontinue his suit, and ordered that small costs should be assessed; and it was so done. Cro. Eliz. 46. pl. 6. Hill. 30 Eliz. B. R. Wickes v. Morefoots.

* [305] For more of Toll in general, see Market, Prescription, and other proper titles.

Tort.

(A) Construction of Law, relating to Torts.

1. **I**F a man *sells a distress* which he took and impounded, and after *rebuys it, and impounds it again*, yet the selling is not excused. Per Mountague J. And Knightly seemed of the same opinion, and cited 5 E. 4. D. 35. b. pl. 34. cites in Marg. 2 E. 4. 55. a. 28 H. 6. 5. b.

2. The *same* of trees cut by lessee, and by him sold, and afterwards by him bought again, and employed for repairs. D. 35. b. pl. 32. Trin. 29 H. 8. Maleverer v. Spinke.

S. P. Co.
Litt. 53. b.
—So if
lessee cuts
trees, and

sells them for money, and with the money repairs the house, it is waste. Co. Litt. 53. b.

3. A. devised a term to B. and makes C. executor, and dies. The executor takes a new lease, which is a surrender and a devastavit. The devisee enters without assent of the executor, by which he is a disseisor, and then grants his interest to the executor. Adjudged that this shall enure as assent of the executor first to the term devised; and this makes the devisee to be in by right, and then he is in of such term in estate, as he may grant. Mo. 358. pl. 487. Trin. 36 Eliz. Carter v. Love.

4. When a man enters, having a good title, he shall not be said to enter by a tortious one. Arg. Mo. 363. pl. 494. in BULLIE'S CASE, cites 12 Aff. where the lord disseised his tenant by knight-service, who died his heir within age. This purged the disseisin. So 38 H. 6. Tenant pur auter vie is disseised, cesty que vie dies, he shall be occupant and the disseisin purged.

5. A man cannot apportion his tort. Cro. E. 651. pl. 6. Hill. 41 Eliz. B. R. in case of HELIAR v. WHITEAR.—6 Rep. 24. b. HELIAR'S CASE.

6. Where a tortious possessor shall be liable to answer consequential damages, though a possessor bona fide shall not in the like case, see Hob. 100. in case of MOORE v. HUSSEY, cites 8 E. 3. 52. and 8 E. 3. 45.

7. When right and wrong do meet together, the right shall ever be preferred. See 3 Bulst. 47. in case of HARRIS v. AUSTIN. And see Roll. Rep. 214. in S. C. [306]

For more of Tort in general, see Disseisin, Ratthabito, Release to Disseisors, and other proper titles.

Tout temps Prist.

(A) Tout temps Prist. [And Uncore Prist.]

* Br. Touts
temps Prist,
pl. 21. cites
S. C.—
But if the
money was

[1. **I**N debt upon obligation, upon condition of payment of a less sum, if defendant pleads a tender, and refusal by plaintiff, yet he ought to say uncore prist. 10 H. 6. 16. b. 11 H. 6. 27. * 14 H. 6. 23.]

to be paid to a stranger, he need not to say uncore prist. And. 4. pl. 7. Pulch. 3 & 4 P. & M. in case of Pannel v. Nevel.

Where a man is bound in 60 l. to pay 40 l. if he pleads tender of the 40 l. in action of debt brought against him of the 60 l. he ought to say that he is yet ready, and always has been ready to pay the 40 l. and bring the money into court, because the less sum is parcel of the greater sum expressed in the obligation, and there refusal of it shall not serve, for it is parcel, &c. Br. Tout temps, &c. pl. 31. cites 20 E. 4. 1. per Brian & Cur.—But ibid. pl. 33. cites 21 E. 4. 42. 52. that it was held, per tot. Cur. in such case, that he need not say that he is yet ready to pay; quod nota. But it is said, that 21 H. 6. is contrary, and so are several other books thereof.

But if the obligation be of 60 l. to enfeoff the plaintiff by such a day, or to deliver to him a horse, or such like, which is not money, tender by the defendant, and refusal by the plaintiff, is sufficient for the defendant for ever. And there in pleading the defendant need not to say, that he has been always ready, and yet is; but in the one case and the other the penalty is saved. But Tout temps, &c. pl. 31. cites 20 E. 4. 1. per Brian & Cur.

[2. If A. covenants with B. to pay him 10 l. after Michaelmas, and before Easter; in debt upon this covenant, if defendant pleads, that within the said time he tendered to the plaintiff the said 10 l. and plaintiff refused it, it is not good without saying uncore prist, &c. Hill. 1649. between NEWTON AND NEWTON, in 2 actions. Adjudged upon demurrer. Intratur. M. 1649. Rot.]

[3. In debt upon obligation, if condition be, that a stranger shall make another deed to the plaintiff; if he pleads a tender to the plaintiff, and refusal by him, he need not say uncore prist. 10 H. 6. 16. b.]

[4. The same law would be, if the defendant himself ought to make the deed. Contra, 10 H. 6. 16. b.]

S. P. per
Brian &
Cur. Br.
Tout temps,
&c. pl. 31.
cites 20 E.

[5. In debt upon obligation upon condition to perform an award if the defendant pleads a tender and refusal of the sum awarded, he need not to say uncore prist. 14 H. 6. 23. Curia. Contra, 11 H. 6. 27.]

4. 1.—But in debt upon arbitrament, he shall say that he has been always ready, and yet is, &c. Br. Tout temps, &c. pl. 31. cites 20 E. 4. 1. per Brian & Cur.

[307.] [6. If I deliver 10 l. to another without deed, to my use, and make a defeasance by deed, if he pays 5 l. &c. if he pleads a tender at the day, he needs not to say uncore prist. Contra, 18 E. 3. 39. b.]

[7. In

[7. In debt upon obligation, whereof a defeasance is made by another deed to pay a small sum, if he pleads tender at the day, he need not to say uncore prist. Contra, 18 E. 3. 53. b.]

S. P. That he need not to say uncore prist, per Prisot

and Littleton, by which they took issue that he did not tender; quod nota. Br. Tout temps, &c. pl. 4. cites 33 H. 6. 3. — Heath's Max. 124. cap. 5. cites S. C. — S. P. accordingly, 9 Rep. 79. b. in Peytoe's case, cites 13 H. 6. 2. a. b. — D. 36. pl. 119. Trin. 4 Eliz. Anon. per Dyer.

So in debt upon an obligation, it was held, that where an obligation is made, and afterwards a defeasance is made thereof, if he pays a lesser sum, &c. there, if he pleads the defeasance and the tender of the lesser sum, he need not to say, tout temps prist; for by the tender he was discharged of all. But otherwise it is of an obligation, with a condition to pay a lesser sum. Cro. Eliz. 755. pl. 16. Pasch. 42 Eliz. in C. B. Cotton v. Sir Gervase Clifton.

[8. The same law is where the defeasance is upon a statute. Contra, 22 E. 3. 5.]

S. P. 9 Rep. 79. b. in Peytoe's

case cites 33 H. 6. 2. a. b.

[9. If a man confirms land to a man in fee upon condition of payment of certain tinne, if he pleads a tender of the tinne at the day, he need not to say, et uncore prist. Quære. 30 Aff. 11.]

10. In detinue of a horse, he shall not say, that he has been always ready, &c. Br. Tout. temps, &c. pl. 31. cites 20 E. 4. 1. Per Brian & Cur.—So of Arbitrement. 16 H. 7. 7. Ibid.

11. It was said, that in debt upon an obligation, it is a good plea that the defendant has been always ready to pay, &c. if he could have acquittance. Br. Tout temps, &c. pl. 39. cites 1 R. 3. and Fitzh. Verdict, 13.

Heath's Max. 127. cap. 5. cites 1 R. 3. 1. S. C. and adds, that

by this it should seem that the plaintiff in that case ought to offer an acquittance as he is to demand rent that is payable on the ground, quære inde.

12. When a bond is for payment of money in discharge of a debt, tout temps prist must be pleaded, notwithstanding a tender; but where the payment of the money is in defeasance of some other collateral matter, as a bond to save harmless, &c. it need not be pleaded. Arg. 10 Mod. 282. cites Co. Litt. 207. a.

13. A difference taken between a bare debt and a penalty to pay a debt, as an obligation with a condition; for in that case it shall be sufficient to plead a tender at the day without [with] an uncore prist, without a tout temps prist; there he may plead a tender to perform the condition, without saying, that he was always ready; but when it is for a bare debt, there he must plead, tout temps prist. And the Court agreed the difference between an obligation with a penalty and a bare debt. Freem. Rep. 205. pl. 209. Mich. 1675. in case of Setle v. Bunnion.

So in assumpsit where the defendant is imparied specially, Windham J. said, that if he had pleaded tender, and that he was now ready, as in

D. 300. it might have been good, but now it seems he is estopped to plead always ready; and Atkins inclined to this, ceteris absentibus; sed advisare volunt. Freem. Rep. 134. pl. 156. Mich. 1673. in C. B. Bone v. Andrews.—3 Salk. 220. pl. 9. S. C. but not S. P.—2 Mod. 70. S. C. but not S. P.

14. If a promise be to pay money on a particular day, there a tender with a tout temps prist is good enough, but it is otherwise where the money is to be paid on request; for there might be laches before the tender. Per Holt Ch. J. Cumb. 444. Trin. 9 W. 3. B. R. Giles v. Hart.

2 Salk. 622. S. C.

(B) *At what Time he may plead this Plea.*

[1.] F the defendant in the action of debt takes his delays by
 Fol. 524. *effoine and * comes by the grand distress, yet he may plead*
 tout temps prist. 18 E. 3. 53. b.]

In *detinue*

against executors, they ought to say, that they have been always ready, and yet are, &c. for otherwise they shall render damages; and they were permitted to say so *at the distress*; quod nota. Br. Tout temps, &c. pl. 37. cites 22 E. 3. and Fitzh. Damages, 103.

In *debt* the defendant came at the distress, and said that he has been always ready to pay, and yet is, and brought the money into court, and the plaintiff demurred because he came at the distress, et non allocatur; for it may be that he was never warned by the sheriff, by which he recovered the sum tendered, &c. without damages, as it seems. Br. Tout temps, &c. pl. 8. cites 7 H. 4. 9. —Heath's Max. 128. cap. 5. cites S. C.

But in *assumpsit*, the defendant came at the distress, and said that he has been always ready, and yet is, to pay, &c. and no plea per Cur. because he came at the distress. Br. Tout temps, &c. pl. 7. cites 2 H. 4. 3.

Heath's
Max. 128.
cap. 5. cites
S. C.
† S. P. and
does no
wrong till a
demand be
made. Co.
L. 33. a.

2. *Dower unde nihil habet*, the tenant came at the first day, and said, that he had been always ready to render dower, and the demandant said, that oftentimes before the writ she demanded dower and could not have it; and was received, inasmuch as it was at the first day. And it is said elsewhere this is inasmuch as the * heir is in by title, but contra in cosinage aiel & mortdancestor; for this is to disaffirm the title and estate of the tenant; note the diversity, for there such averment shall not be taken. Br. Tout temps, &c. pl. 34. cites 2 H. 4. 7.

3. In *debt* the defendant joined issue for part, and as to the rest tendered it in court, and said, that he has been always ready, and yet is, and said, that he tendered it to the plaintiff at the summons, and attachment, and distress in London, &c. Br. Tout temps, &c. pl. 11. cites 11 H. 4. 55.

S. P. Br.
Tout temps,
&c. pl. 36.
cites 7 H. 7.
16. —
Heath's
Max. 128.
cap. 5. cites
same cases.

4. In *dower*, *effoin cast* for the defendant does not stop him to say, that he has been always ready, and yet is, to render dower in case the demandant will render him his evidence concerning his land which he has by descent, &c. For the effoin may be cast by a stranger, and therefore shall not prejudice the tenant; quod nota, per Cur. Br. Tout temps, &c. pl. 20. cites 14 H. 6. 4.

Heath's
Max. 128.
cap. 5. cites
S. C. —
Br. Tout
temps, &c.
pl. 42. cites
S. C. —
In debt upon
an obliga-

5. In *dower*, the tenant said, that he has been always ready to render dower, and yet is, to which the demandant said, that to this he shall not be received; for at such a day the original was returnable and the parties appeared, and the demandant made her demand, and the defendant imparled, and had day such a day; and per Aderne J. and Danby Ch. J. this is an estoppel, to say that he has been always ready, &c. Br. Tout temps, &c. pl. 27. cites 5 E. 4. 141.

tion, the defendant, after oyer of the same, imparled, and now pleaded that he was ready to pay the money at the day and place, and that none was there to receive it, and that he is now ready, and tendered the money in court, and said not tout temps, and a good plea as it seems; for he had excused the forfeiture by the plea above, and he shall not be estopped by the imparlance to plead the plea above, per several Justices, but Lennard custos brevium aliter sentit. D. 300. pl. 37. Pasch. 13 Eliz. Anon. — Cro. J. 627. pl. 21. Mich. 19 Jac. B. R. Steward v. Coles, S. P. and the plaintiff offered to demur because the defendant did not plead tout temps prist, and though he tendered it at the day, whereby he saved it for the time, yet if he pleads not this plea, it shall be intended that he has forfeited his obligation, and whether he should have judgment or no was much doubted: so that the defendant durst not insist upon

upon this plea; but by direction and mediation of the Court he paid 500 l. in satisfaction of the debt, and 100 l. costs and damages.——It is true in debt upon bond such plea is good after imparlance, because it is to *save the penalty*. Arg. cites D. 300. but when a *single duty* is demanded, and the party is entitled to damages for non-payment, the plea of tout temps prist is not good. Arg. 2 Mod. 62. Anon. (And judgment according to the last part of the diversity.)——The case of D. 500. is good law. Per Holt. Comb. 334. Trin. 7 W. 3. B. R. Broom v. Pine.

* Assumpsit for money due for work, the defendant has a special imparlance, *salvis omnibus exceptionibus tam brevi quam narrationi* (& *advantageis* omitted), and then comes and pleads that he tendered him the money, and was always ready to pay him, and uncore prist. The plaintiff in his replication shews, that the defendant did imparl ut supra, and demands judgment, whether or no, after this imparlance, he shall be permitted to plead a tender, and that he was always ready. And it was insisted, that it is a contradiction after an imparlance, to plead he was always ready; for if he were ready, why did he imparl? Besides, the entry is saving all exceptions to the writ and the declaration, and he shall not have more than he has reserved, and cites Br. Tout temps Prist, 27. accordant. 2 H. 6. 13. Windham J. p. rhaps if you had pleaded your tender, and that you are now ready, as it is pleaded in Dyer, 300. it might have been good; but now it seems that you are estopped to plead that you were always ready. And Atkins inclined hereto *ceteris absentibus*; sed *advizare* volunt. Freem. Rep. 134. pl. 159. Mich. 1673. Bone v. Andrews in C. B.

It cannot be pleaded in an *indebitatus assumpsit* after imparlance; for it is contradictory to such plea, for the money was due on the day of the assumpsit. Carth. 413. Giles v. Hart.——2 Salk. 622. pl. 1. Mich. 9 W. 3. S. C.——12 Mod. 152. S. C.

So in debt for rent, the defendant imparls generally, and then pleads tout temps prist. The Court held this plea could not be pleaded after a general imparlance; for it is † contradictory to say he was always ready, and yet to take time to answer to the declaration. Freem. Rep. 205. pl. 209. Mich. 1675. Serle v. Bunnion.

† S. P. Per Holt Ch. J. Comb. 334. Trin. 7 W. 3. B. R. in case of Broom v. Pine.——S. P. 2 Mod. 62. Anon.

One must plead tout temps prist *always before imparlance*. 12 Mod. 72. Pasch. 17 W. & M. Anon.——S. P. 12 Mod. 83. Mich. 7 W. 3. in case of Wigmore v. Veale.

Upon point of pleading of tender this *diversity* was taken by Holt Ch. J. that tender *at the day* is no plea to a *single bill* but only in *bar of damages*, in which case you must plead it *before imparlance* with a *tout temps* and uncore prist & profert, &c. but tender at the time is a good plea to a *penal bond in bar*, because it saves the forfeiture, and therefore may be *after imparlance*. 12 Mod. 354. Pasch. 12 W. 3. in case of Horne v. Luines.——But the reporter cites 1 Inst. 207. a. 21 Ed. 4. 25. pl. 39. and says, this seems to hold only where the penal bond is for doing a *collateral thing*, and not where it is for *payment of money*, but says, vide the case in Dyer, 300. a. that in case of a bond for payment of money, he may plead tender and uncore prist after imparlance. 12 Mod. 354. in case of Horne v. Luines.

6. In debt, at the *capias* the defendant came and found surety, and had *superfedeas*, and tendered the money, and said that he has been always ready, &c. and yet is, and tendered the money. And per Littleton, he may plead this well, because he was returned nihil upon the original, and had not conusance till the *capias*. Contra if he had had conusance before. Br. Tout temps, &c. pl. 30. cites 8 E. 4. 9.

7. In *detinue* of divers parcels, tender of part is a good plea to it before verdict, &c. Br. Tout temps, &c. pl. 39. cites 1 R. 3. But if there be a verdict, then is the sum of the value made a thing entire, whereof the plaintiff is not bound to receive part without the whole. Heath's Max. 127. cap. 5. S. C.

8. In debt upon a *single bill*, or for rent, the plaintiff declares that the defendant hath not paid him licet *sæpius requisitus*; the defendant may plead that he was always ready and still is ready, and pray judgment of damage; and then the plaintiff, if he will have *damage*, must reply, and shew a *special request*; per Holt Comb. 334. Trin. 7 W. 3. B. R. Broom v. Pine.

(C) Tout temps Prist. [*And Uncore Prist, after Verdict for Defendant on the Tender.*]

[1.] IF the defendant be to pay a less sum, and defendant pleads a tender at the day with an uncore prist, if the plaintiff refuse the money, and takes issue that he did not tender it at the day, and it is found against him, he has not any remedy for the less sum. 18 E. 3. 39. b. quære. 53. b. quære. 25 E. 3. 45. b. quære.]

[2. So if he pleads payment of part, and tender and refusal of the residue with an uncore prist, and plaintiff refuses the money, and
[310] takes issue that he did not pay the sum alleged, and this is found against him, he shall not have the residue of which defendant pleaded uncore prist. Contra, 22 E. 3. 5. Curia.]

[3. But he might have taken that money after the issue joined. 22 E. 3. 5.]

(D) How the Pleading shall be. Where he shall bring the Thing [viz. Money] into Court.

[1.] IF a man pleads a tender of money with an uncore prist, &c. it is no good plea without bringing the money into court. Mich. 1650. between WITHAM AND LITTLE adjudged upon demurrer. Intratur Hill. 1649. Rot. 121.]

Debt upon an obligation indorsed, that if he paid 10 l. at D. such a day, that then, &c. [2. In debt upon obligation, if condition be to pay a less sum at D. if defendant pleads a tender and refusal, with an uncore prist, it is not sufficient to say uncore prist at such a place, but he ought to bring the money into court. 11 H. 6. 27.]

And he said that he was there that day, and tendered it, & hoc, &c. Tirwhit said, you ought to tender it in court now. Et non allocatur; for he is not bound to pay it at another place than is comprised in the condition; as in replevin the defendant avowed, the plaintiff alleged tender upon the land tempore captionis, and he refused, and good without tender now; for the rent is only payable upon the land. Br. Tout temps, &c. pl. 35. cites 5 H. 4. 18. — Br. Tender, pl. 6. cites S. C.

But in debt by obligation of 60 l. upon condition to pay 10 l. at such a day and place, the defendant said that he was ready at the day and place, and offered, &c. and the plaintiff refused, and the plea challenged, inasmuch as he did not say that he has been always ready after, and tender the money in court; and the defendant said that he is not bound to tender it, unless at the place expressed in the condition. And yet per tot. Cur. he ought to tender it now. Contra, 5 H. 4. 18. supra. But this book is taken for the best law at this day. Br. Tout temps, &c. pl. 43. cites 7 E. 4. 3.

So where the less sum was to be paid at the holt in the mansion-house of the obligor, at a certain day, and the obligor pleaded that he was ready at holt to have paid, but nobody came to receive it, but did not say uncore prist; and therefore held no plea. And. 4. pl. 7. Pasch. 3 & 4 P. & M. Pannel v. Nevel. — D. 150. pl. 84. Trin. 3 & 4 P. & M. S. C. And because he did not say uncore prist, with a tender of the money in court, nor say uncore prist to pay at the holt, the Court without argument adjudged it no plea; but that it would be otherwise if the condition had been to do a collateral act, and not to pay money, which is of the nature of the sum in the penalty, and the very duty, by intendment of law, for surety whereof the obligation of the greater sum was made, and cited 7 E. 4. But per Catlyn and Griffin the attorney general, the law is not so, because the place of payment is parcel of the condition, and it ought not to be paid elsewhere. And so is the diversity in 7 H. 4. where a place of payment is put, and where not, &c. — Bendl. 54. pl. 90. S. C. adjudged no plea by all the Justices, because the sum remains a debt still, notwithstanding the tender at the holt; and cites 7 E. 4. according to this judgment, though in 7 H. 4. it was adjudged contrary; but they did not hold this to be law now. And the reporter adds a quære, if he had pleaded that he was uncore prist to pay this sum at the holt aforesaid, whether this would have been a good plea?

[3. The *same* law is, where the *condition* is to perform an award, ^{Debt upon} which was to pay a sum at D. it is not good to say, ^{obligation} ready at D. (admitting that he ought to say uncore prist. ^{upon condi-} Contra, ^{tion to stand} 11 H. 6. 27.] ^{to arbitre-}

^{ment ; the} defendant pleaded that the arbitrators awarded that he should pay in such a place, which he has been always ready to pay, and yet is, and did not tender the money in court ; and yet good by the opinion there, because it is payable at another place, and he is ready to perform the award. And so it seems that if the place certain had not been in the award, he ought to have tendered the money in court. Br. Tout temps, &c. pl. 41. cites 11 H. 6. 27.

4. In assise of rent the tenant pleaded to part a release, and to other part disseisin of the land for a time, to suspend the rent, and to the rest that he has been always ready, and yet is, and tendered the money in court ; nota. Br. Tout temps, &c. pl. 25. cites 8 Ass. 35.

5. Covenant by the lessee against the lessor for ousting him of his term, the defendant pleaded in bar a clause of re-entry for rent arrear, and the plaintiff to part of the rent pleaded accord to recoup it for boarding the defendant, and to the rest pleaded tender, and that the defendant refused it and ousted him, and yet is ready, &c. and tendered the money in court ; quod nota, and demanded judgment, and prayed restitution, and his term and damages. Br. Tout temps, &c. pl. 5. cites 47 E. 3. 24. [311]

6. In trespass the defendant pleaded arbitrement to pay 10l., &c. This is no plea, per Marten, if he does not say that he has paid it, or say that he has been always ready, and yet is, and bring the money into court, and this seems to be where the day of payment is past. Br. Tout temps, &c. pl. 15. cites 8 H. 6. 25.

7. In debt the defendant as to parcel said that he has been always ready to pay, and yet is, and brought the money into court, and to the rest pleaded in bar, the plaintiff pleaded in estoppel to the saying that he has been always ready, &c. for that he imparled the last term ; judgment if he shall be received to say that always ready, &c. And per Danby, the plaintiff shall not have the money here till the other issue be tried, and this by reason that the damages shall not yet be tried till the other issue be tried ; but per Prisot, he may have judgment of his debt of this parcel, and his damages, & cesset executio ; for those may be well assessed by the Court as to this parcel, but the plaintiff shall not have it till the other issue be tried, by reason that the costs shall be entire, which cannot be taxed till the other issue be tried ; and when the plaintiff pleaded the estoppel above, the defendant prayed to have his money again. And per Prisot, he shall re-have it ; quod non fuit concessum ; for he has confessed of this part. And by him, if the plaintiff will relinquish his estoppel, he shall have delivery of the money without damages and costs ; and the plaintiff afterwards relinquished the estoppel, by which the money was delivered to him. Br. Tout temps, &c. pl. 22. cites 36 H. 6. 13.

8. Debt upon an obligation of 10l. to pay 40s. such a day ; the defendant pleaded payment of 20s. at the day, and that he offered 20s. residue there the same day, and the plaintiff refused it, and that he has been always ready to pay it, and yet is, and tendered the money in court, and the plaintiff tendered to aver that he did not tender the

Heath's
Max. 124.
cap. 5. cites
S. C.

20s. *at the day*. Per Cur. now the defendant shall have the money again, and so he had; and if the issue be found for the plaintiff the obligation is forfeited; and if it be found for the defendant, the plaintiff has lost the 20s. Quod nota; for he has refused it by matter of record, and took the other issue at his peril. Br. Tout temps, &c. pl. 32. cites 21 E. 4. 25.

Comb. 443,

444. S. C.

Holt thought

they should

have said,

that all times

after the

promise they

were ready,

& tali die

tendered, &c.

— 3 Salk.

343. S. C.

— Carth.

9. In *indebitatus assumpsit*, & *quantum meruit*, the plaintiff laid a special request at such a day and place, and that the defendant refused to pay, the defendant pleaded that such a day before the request, he tendered, and the plaintiff refused, and that afterwards *semper paratus fuit*, & *profert hic in cur.* Holt Ch. J. said, that where the agreement is to pay at a certain time, there a tender at that time, & *semper paratus*, is a good plea; but where the money is due, and payable immediately by the agreement, there the defendant must plead *semper paratus* from the time of the promise. 2 Salk. 622. pl. 1. in case of *Giles v. Hart*.

413. S. C. and adjudged ill upon demurrer, because the defendant has not said any thing as to the time between the promise and the request, and the money was due on the day of the promise; and therefore the defendant should have pleaded the tender on that day, and that he from that day was always ready; for the special request laid in the declaration is only surplusage, and therefore the day on which the request was made is immaterial; and when once the cause of action accrued, a subsequent tender could not take it away. But per Holt Ch. J. In these cases the best way of pleading is to plead generally *semper paratus*, &c. & *profert hic in curia*, without pleading any tender. — If he pleads that he was always ready, this refers to the time of the promise made, and not to the time of the tender; per Holt Ch. J. *Ld. Raym. Rep.* 254. S. C. and says that judgment was given for the plaintiff, and that if the defendant had pleaded *tout temps prist*, the plaintiff should have replied, and shewn the request, and the time when it was made.

[312]

Where debt

is brought

on a bond,

conditioned

to pay mo-

ney at a day

certain, if

the defendant

pleads a tender

at the day,

and that he

has been always

ready, &c. it

is good. But

in

assumpsit, or

debt upon a

single bill,

he must plead

that he has

been always

ready. *Ld. Raym. Rep.*

254. per Holt

Ch. J. in case

of *Giles v. Hartis*.

— 3 Salk. 353.

S. C.

10. There is a difference between debt and assumpsit; for in debt the damages are but accessory, but in assumpsit they are principal; therefore in debt the defendant may plead in bar of the damages; but in assumpsit he must plead *semper paratus*, with a *profert in cur.* and demand judgment de *ulterioribus damnis*. 2 Salk. 623. pl. 1. Mich. 9 W. 3. B. R. *Giles v. Hart*.

the defendant pleads a tender at the day, and that he has been always ready, &c. it is good. But in assumpsit, or debt upon a single bill, he must plead that he has been always ready. *Ld. Raym. Rep.* 254. per Holt Ch. J. in case of *Giles v. Hartis*. — 3 Salk. 353. S. C.

11. In debt upon bond, with condition to pay the money, if the defendant pleads a tender with *adhuc paratus*, he ought to bring the money into court; because it is parcel of the demand. Per tot. Cur. *Ld. Raym. Rep.* 643, 644. Hill. 12 W. 3. in case of *Horn v. Lewin*.

(E) Where he shall bring the Thing into Court.

In detinue of

a chest of

charters, it

is no plea

that they

came into

their hands

sealed, as

executors;

and that they

[1.] If the thing in demand be so ponderous, that it cannot be carried, he may plead uncore prist, without bringing it into court. 11 H. 6. 29. b. 30 Aff. 10.]

[2. But in such case he ought to plead so; that is to say, that it is so ponderous, that it cannot well be carried. 11 H. 6. 29. b. 30 Aff. 10. so pleaded.]

have been always ready, and yet are to deliver them, &c. unless they offer them to the Court,

Court, or ſay that they are ſo ponderous that they cannot bring them here for the weight; quod nota, per Cur. Br. Tout temps, &c. pl. 3. cites 9 H. 6. 65.

3. In ward, he who pleads that ſuch a writ is brought againſt him, and that he is ready to deliver to whom the Court ſhall award, and ſays, that he does not claim any thing but by cauſe of nurture, ought to have the infant ready at the bar. Br. Tout temps, &c. pl. 17. cites 24 E. 3. 31. Heath's Max. 125. cap. 5. cites S. C. — The defend- ent in writ of ward,

pleaded, that he claimed nothing, &c. but for nurture; and that W. has brought ſuch a writ againſt him; and prayed, that they interplead, and that he is ready to render him to whom the Court ſhall award; but he has not the body ready; for it is in peril of death, and in peril of water at S. Et non allocatur. But it was awarded, that the plaintiff recover the marriage. Quære of the damages; quod nota. For Given ſaid, that to thoſe matters the plaintiff cannot have answer, &c. Quære if this be the reaſon. Br. Tout temps, &c. pl. 19. cites 24 E. 3. — Br. Gard. pl. 49. cites 24 E. 3. 66. S. C. — Heath's Max. 125. cap. 5. cites S. C.

Where ſeveral writs of ward are brought, and the defendant ſays he is ready to render the infant to whom the Court ſhall award, and has not the infant, there he ſhall find mainprife to have the infant there at the day. Br. Tout temps, pl. 38. cites 8 E. 3. and Fitz. Gard. 25. — Heath's Max. 125. cap. 5. cites S. C.

4. He who pleads arbitrement in treſpaſs, to give a piece of cloth, ſhall ſay, that he has been always ready to give it, and yet is, and bring the cloth into court; quod nota. Br. Tout temps, &c. pl. 9. cites 5 H. 4. Br. Arbitre- ment, pl. 12. cites 7 H. 4. 31. S. C.

5. In detinue of 10 quarters of barley, the defendant, as to four quarters, ſaid, that he has been always ready to deliver them, and yet is, which he could not have in court for portage, but is ready to deliver them, &c. and to the reſt waged his law. And the plaintiff to the four quarters ſaid, that after the bailment, and before the action brought, he required him at D. in the county of S. and he refuſed, &c. Br. Tout temps, &c. pl. 28. cites 6 E. 4. 11. Heath's Max. 126. cap. 5. cites S. C.

(F) Uncore Priſt. Neceſſary to be pleaded, or not. [313]
In what Caſes.

1. **I**N audita querela, the plaintiff declared upon defeſance to pay 10 l. at ſuch a day, and 10 l. at another day, and that he paid the firſt ſum at the day, and tendered the laſt at the day, and he re- fuſed, and he is yet ready to pay, and tendered the money in court; quod nota. Br. Tout temps, &c. pl. 6. cites 47 E. 3. 25.

2. Debt upon an obligation. Newton ſaid, it is indorſed upon condition, that if J. N. ſhall ſtand to the award of W. P. of all matters between him and the plaintiff; if the award be made before ſuch a day, or that the ſaid J. N. render himſelf to the plain- tiff about the ſame day, that then, &c. And ſaid, that the arbi- trators did not make any award; but the ſaid J. N. about the afore- ſaid day, proffered himſelf to the plaintiff, and he refuſed him, & hoc, &c. Judgment ſi actio, &c. Caund. ſaid, you ought to ſay, that you are yet ready, as upon obligation of 40 l. to pay 20 l. But the Court held the plea good, and a great difference between the caſes. The reaſon ſeems to be inasmuch as the one is to do an act debors, and the other of payment of money. Br. Tout temps, &c. pl. 21. cites 14 H. 6. 23.

Br. Tout temps Prist, pl. 16. cites S. C. for he has no other remedy but upon the same obligation. — S. P. Ibid. pl. 6. cites 47 E. 3. 25. — S. P. Ibid. pl. 44. cites 16 H. 7. 7. — Heath's Max. 124. cites S. C. — S. P. For this is parcel of the sum in the obligation; per Cur. Br. Tout temps Prist, pl. 1. cites 19 H. 8. 12.

3. In debt upon an obligation of 20 l. to pay 10 l. if the defendant pleads tender and refusal, he shall say, that he has been always ready, and yet is, and tender the money in court. Br. Dette, pl. 98, cites 22 H. 6. 39.

Br. Tout temps Prist, pl. 16. cites S. C. per Newton; for he cannot be ready to pay before the day, where the day is past. Contra by him, if it had been to be paid at a day which is to come, and in this case he may have debt upon the arbitrement, over and above the obligation.

4. But if it be upon an obligation to stand to the arbitrement, which awards to pay 10 l. before Christmas, and debt is brought after Christmas, and he pleads payment and refusal, he need not say that he has been always ready, and yet is, &c. Br. Debt, pl. 98. cites 22 H. 6. 39.

S. P. Br. Ibid. pl. 44. cites 16 H. 7. 7. For the sum awarded by the arbitrement is not any part of the sum in the obligation. — Heath's Max. 128. cap. 5. cites S. C.

S. P. Ibid. pl. 1. cites 19 H. 8. 12. For it is an exterior and collateral act.

S. P. Arg. Show. 129. in case of CARTER v. DOWNISH, cites 2 Inst. 207. PEYTOR's case, 9 Rep. 79. S. P. per Littleton. But by him, in action of debt upon arbitrement, he shall say, that he has been always ready, &c. Quod non negatur. Br. Tout temps, &c. pl. 4. cites 33 H. 6. 3.

This seems to come within the reason of D. 150. pl. 84. that the thing to be paid is of the nature of the sum in the penalty, and the very duty by indentment of

5. B. brought debt for 40 quarters of malt, and counted upon 2 obligations, in which the defendant acknowledged himself to owe 20 quarters, to be delivered at L. such a day, and if he failed, to forfeit 40 quarters; and averred, that he did not deliver the 20 quarters. The defendant pleaded tender, and that the plaintiff refused to receive them. Judgment, &c. The plaintiff demurred, and had judgment; and he remitted 20 quarters, &c. For defendant ought to have said, that he was uncore prist to deliver the 20 quarters. D. 24. b. pl. 154. Mich. 28 H. 8. cites Trin. 12 H. 8. Brickhead v. Wilson.

law, for surety whereof the obligation of the greater sum was made. — 9 Rep. 79. a. b. Mich. 9 Jac. C. B. in PEYTOR's CASE, cites it as held in 28 H. 8. according to Carrel's report of it, that the obligor needs not plead it with an uncore prist; because this corn is bonum perituum, and it is a charge to the obligee to keep it. — Co. Litt. 107. a. accordingly.

[314] 6. In debt upon an obligation of 20 l. which is indorsed, to pay to the plaintiff so much money for such a trespass as J. N. shall assess, it is a good plea, that J. N. assessed 10 l. which he offered to the plaintiff, and he refused, without saying that he is uncore prist, and tendering the money in court; for it is an exterior and collateral act. Br. Tout temps, &c. pl. 1. cites 19 H. 8. 12.

7. Where J. S. is bound to me in 20 l. that W. shall perform the covenants contained in a certain indenture, &c. which covenant is, that W. shall pay to me 10 l., &c. if the defendant says, that W. tendered the money to me, and I refused it, this is a good plea, and need not say, that he is uncore prist, and tender the 10 l., &c. And the reason seems to be, inasmuch as the defendant is a stranger to the payment. And also the condition is to perform the covenants in the indenture; and it is not as an obligation of 20 l. upon condition that the obligor shall pay 10 l. by a day. Note the diversity. Br. Tout temps, &c. pl. 2. cites 27 H. 8. 1.

8. A *legacy* is devised to H. and the executor gives bond to perform the will, and yet he is not bound to tender the legacy without *request*. And in debt upon the bond, tout temps prist, and uncore prist, is a good plea; for the bond has not altered the nature of the legacy, but the same remains payable as before upon request. Le. 17. pl. 20. Pasch. 26 Eliz. B. R. Fringe v. Lewes.

9. In debt on *bond*, no place being named, if the defendant pleads that the plaintiff was beyond sea at the day, he ought to say uncore prist. Sid. 30. pl. 7. Hill. 12 Car. 2. B. R. Hobson v. Rudge.

10. Condition of a bond was to pay money to B.'s administrators within 2 months after B.'s decease; though no letters of administration were granted within 2 months after B.'s decease, yet to an action of debt for the 200 l. defendant must plead uncore prist; for the debt is not lost. 2 Show. 143. Mich. 32 Car. 2. B. R. Lee v. Garret.

Raym. 416.
S. C. accordingly.

11. Uncore prist is *nowhere necessary* but where the duty is *demanded; here is only covenant, which is not to recover the duty, but damages. But were it otherwise, wheresoever the money is payable to a stranger, or at a particular place, there needs no uncore prist. Arg. and judgment accordingly. Show. 129. Mich. 1 W. & M. in case of Carter v. Downish.

*Per Gould.
Where the thing in its nature requires a demand, a bond for doing thereof is not forfeited till

demand; and in that case the defendant must take advantage of the want of demand, by pleading that he was always, and still is ready to pay it; for if he plead performance generally, and plaintiff assigns a breach in his replication, the defendant shall not rejoin, and allege want of demand; for that would be a departure; quod Holt concessit. 12 Mod. 414. in case of Levins v. Randall, cites 1 Cro. 76, 77.

12. There is no necessity for uncore prist in any case of *covenant* where damages, and not the debt, is in demand; per Pollexfen Ch. J. Show. 130. Carter v. Downish.

13. Debt on bond *conditioned to pay to obligee, or such as he should appoint*, he appoints it to be paid to J. S. and the defendant tendered it to J. S. who refused, it is good without an uncore prist. Arg. Show. 130. in case of Carter v. Downish.

(G) Uncore Prist. Necessary to be pleaded, or not. In what Actions, and how.

1. *ASSISE* of 10 s. rent, and 40 acres of land put in view, and the tenant said that the plaintiff himself is seised of 15 of the acres, and he himself is tenant of the rest, and said that he has tendered the services for the portion of the land which he has, and yet is [315] ready, &c. Br. Tout temps, &c. pl. 24. cites 4 Aff. 5.

2. In *dower* the tenant said that the demandant detained from him certain evidences concerning the same land, and if she will deliver the evidences, he is and always has been ready to render dower, judgment, &c. Br. Tout temps, &c. pl. 13. cites 14 H. 4. 33.

S. P. And the demandant said that she is, and always has been ready to

render the evidences, prist; by which she had judgment immediately; and yet it does not appear that she offered the evidences to the Court. Br. Tout temps, &c. pl. 14. cites 21 E. 3. 8.

Uncore prist is no plea in *dower*, unless an actual assignment is made. Arg. and seems admitted. 8 Mod. 25. Hill. 7 Geo. 1. 1721. in case of Spiller v. Adams.

Heath's
Max. 126.
cap. 5. cites
S. C. And
ſays the de-
fendant
ought not to
tender the
arrears, be-
cauſe the plaintiff ſhall have debt for the ſame.

3. *Annuity of arrears by 5 years, the defendant ſaid that it was granted till he promoted the plaintiff to a competent benefice, and he tendered to him a competent benefice pending the writ, and he refuſed; and a good plea without ſaying that he is uncore priſt; for by the refuſal the annuity is determined. Br. Tout temps, &c. pl. 18. cites 5 H. 5. 1. and 14 H. 7. 32.*

Heath's
Max. 126.
cap. 5. cites
S. C.

4. *Detinue of a writing, the garniſhee came by proceſs, and ſaid that it was delivered to the defendant, upon condition to ſtand to the arbitrement of J. N. that then he ſhall re-have it, and that J. N. awarded that he ſhould pay to the plaintiff 40 s. which he tendered, and the plaintiff refuſed it, and did not offer the money now in court, nor ſay that he is uncore priſt, &c. and yet good per Cur. becauſe the money is not now in demand; quod nota. Br. Tout temps, &c. pl. 23. cites 36 H. 6. 26.*

S. P. Heath's
Max. 126.
cap. 5. cites
7 H. 4. 3.

5. *Where the defendant in treſpaſs of goods makes a good juſtification, he ſhall not ſay that he has been always ready, and yet is, to deliver them to the plaintiff, notwithstanding that he has confeſſed that they belong to the plaintiff. Br. Tout temps, &c. pl. 29. cites 7 E. 4. 3.*

6. *In a quantum meruit, or other declarations, it is uſual to plead uncore priſt ſpecially, viz. that the plaintiff deſerved only ſo much, which the defendant was always ready to pay. Sid. 365. a nota of the reporter's, at the end of the caſe of Ludlow v. Stacy.*

See (B).

(H) Uncore Priſt. Pleadable, at what Time.

1. *DEBT upon a leaſe for years rendering rent, payable annually at D. the defendant ſaid, that he has been always ready to pay, and yet is, and tendered the money to the Court. The plaintiff pleaded eſtoppel; that the ſheriff returned the defendant ſummoned, and after returned him attached, and after returned diſtring. nihil; by which capias iſſued till the pluries, when he came in ward of the ſheriff, and day given over. At which day he made default, and diſtreſs iſſued, and returned that he had nothing; and capias iſſued again, returnable, &c. at which day he came and pleaded, judgment, if againſt this record he ſhall ſay always ready. And per Hank. and Hill, the return of the ſheriff is no eſtoppel; but Thirn. e contra, & adjournatur. And much default was ſaid to be in the defendant, becauſe he appeared and had day over, and made default, and after came again; ſo that it cannot be that he has been always ready, &c. And per Norton, he ought to plead this tender at D. according to the reſervation. Quære inde. And ſo, per Hill and Hank. clearly, he ſhall not be eſtopped; for it*
[316] *may be that he was never ſummoned, attached, or diſtrained, notwithstanding the return. But Thirn. contra, and that if it be ſo, he ſhall have action of diſceit againſt the ſheriff. Br. Tout temps, &c. pl. 12. cites 11 H. 4. 61.*

2. It

2. It was ruled, that *after imparlance* in debt upon an obligation, the defendant shall be admitted to plead always ready; though 13 Eliz. in *DYER*, was urged to the contrary. Win. 68. Mich. 21 Jac. C. B. Anon.

S. C. For tout temps prist need not be pleaded in that case. 12

Mod. 8. Mich. 13 W. 3. Anon.—So in case upon a *mutuus* for 20 s. the plaintiff declared upon 2 other promises; and the defendant, after an imparlance, pleads uncore prist. Upon demurrer it was held per Cur. that where the sum and day are certain, the defendant may plead uncore prist; but not after an imparlance, for that shews that he was not tout temps prist. Sid. 364. pl. 12. Pasch. 20 Car. 2. B. R. *Ludham v. Stacy*.

For more of *Tout temps Prist* in general, see *Condition*, *Detinue*, *Dower*, *Tender*, and other proper titles.

(A) Town and County.

1. *ACCOUNT* upon receipt in *Newcastle* upon Tyne, brought in the county of Northumberland, the defendant demanded judgment of the writ; for Newcastle is a county in itself; and because it was made a county after the teste of the writ, therefore the writ awarded good. Br. Brief, pl. 530. cites 2 H. 4. 18.

2. *Trespass*; the writ was put T. D. of *Norwich*, gentleman, the defendant demanded judgment of the writ, because *Norwich* extends into the county of N. and into the county of the Vill of N. and yet the writ good per Cur. But if it was against T. D. of the county of *Devon*, or of *Devon*, which is a county, and not a vill, it is ill. Contrary of this which is a vill and county. Br. Brief, pl. 23. cites 27 H. 6. 4.

3. A man in plea of land in the county of *York* recovered land which lay in *York*, and after, before execution, the vill of *York* was made a county, by which he sued *scire facias* to the sheriff of the county of the city of *York*, and not to the sheriff of the county of *York*. Br. Variance, pl. 8. cites 28 H. 6. 1.

4. The county of the city of *Gloucester* extends 4 or 5 Miles further than the city. Arg. Cro. E. 264. Mich. 33 & 34 Eliz. in the Sheriff of *Gloucester*'s case.

5. King R. 3. made the city of *Gloucester* a county, with a clause of exemption from the county of *Gloucester*, and from the power of the officers of the county and magistrates, saving to the king and his heirs liberty for their justices of assise, gaol-delivery and peace, to keep their sessions there. And upon the resolution of all the justices at Serjeant's-inn, this was a good saving, and that those justices in their sessions to be held within the city, may hear and determine offences

And likewise there was a saving for the sheriff of the county to hold his county-courts there, and to keep

low and mean concernment. To which he pleaded the custom of London, that a man who had served an apprenticeship to one trade might exercise any other. And the custom was found against him, and judgment given against him accordingly. Hard. 54. pl. 1. Pasch. 1656, in Scacc. in case of HAYES v. HARDING, cites it as Mich. 14 Car. B. R. Appletoft v. Sturton.

11. Action was brought for using the trade of a *draper*. After verdict for the plaintiff, it was moved in arrest of judgment, that the statute does not name the trade. But it was answered by the other side, that the trade is comprised in the meaning of the statute, *because it was a trade used at the time of making the statute*. Sty. 223. Trin. 1650. Naylor v. Ash.

12. Whether the art of *soap-making* be within the 5 Eliz. cap. 4. see Hard. 53. Pasch. 1656. in the Exchequer. Hayes v. Harding.

[319] 13. Upon an indictment on the statute 5 Eliz. the question was, if a *tallow-chandler* is within it. But adjournatur. 2 Sid. 177, 178. Hill. 1659. B. R. Stubington's case.

The trade of a *tallow-chandler* seems admitted to be within the statute. See 4 Le. 9. pl. 39. at (C) And see (D) the King v. Collier.

Keb. 411. 14. In an action on the statute 5 Eliz. for using the trade of a *barber*, Twisden J. hesitated at first whether it be a trade within the statute; but at length all agreed that it is. Lev. 87. Mich. 14 Car. 2. B. R. Anon.

seems to be S. C. and held accordingly. — Vent. 326. Hill. 29 & 30 Car. 2. B. R. in the case of the KING v. PLUM, Arg. it was said, that in 14 Car. 2. an indictment was for using the trade of a barber, but no judgment given. But others said, that in that case judgment was given for the King. — 2 Lev. 206. in the case of the KING v. PLYM, S. C. Arg. said this point was adjudged, and that it was agreed.

Sid. 367. pl. 4. Trin. 20 Car. 2. B. R. in case of the KING v. CELLERS, it was said, per Cur. to be commonly held that the law is, that a barber is within the statute. — Lev. 243. S. C. the Court said, it had been resolved that a barber is a trader within that act.

15. The using the trade of a *butcher* in selling meat, was conceived per Cur. not to be within the statute 5 Eliz. 4. 2 Keb. 391. pl. 76. Trin. 20 Car. 2. B. R. the King v. Jackson.

16. The Court said, that the law is commonly held to be, that a *mercer* is within the statute of 5 Eliz. Sid. 367. pl. 4. Trin. 20 Car. 2. B. R. in the case of the King v. Cellers.

17. The Court said, that it had been resolved that a *taylor* is a trader within the statute 5 Eliz. Lev. 243. Trin. 20 Car. 2. B. R. in the case of the King v. Sellers.

18. Whether a *silk-weaver* is, see 2 Mod. 246. Trin. 29 Car. 2, Forest qui tam, &c. v. Wire.

2 Lev. 206. 19. P. was indicted upon the statute 5 Eliz. for using the trade of a *fruiterer*, not being apprentice to it for 7 years. Upon demurrer to the indictment the Court was divided; two judges thought it was a mystery within the statute, there being great art in chusing the times to gather and preserve their fruit. The other judges seemed of opinion otherwise; but the Court took time to deliver their positive opinions, & adjournatur. Vent. 326. Hill. Mich. 29 Car. 2. B. R. the KING v. PLYM, S. C. of a *fruiterer*, or *fruiterer*, says, that Twisden and

29 & 30 Car. 2. B. R. and Ibid. 346. Hill. 31 & 32 Car. 2. B. R. Jones held the King v. Plume. strongly, that it is not a

trade within the statute. Rainsford dubitante, Wilde absente, adjournatur.——2 Salk. 611. pl. 2. in case of the KING v. SLAUGHTER, Arg. says, that Pasch. 4 Jac. 2. such indictment was reversed.

Roll. Rep. 10. Pasch. 12 Jac. B. R. in the case of the KING v. TOLZIN, it was cited by Coke Ch. J. to have been adjudged and affirmed in a writ of error, that a *pippin-monger* is not within the statute, because it requires not any skill to exercise this trade.——S. P. cited by Coke Ch. J. 2 Bulst. 189, 190. to have been adjudged and affirmed in error; for the statute speaks of mystery or trades, and they resolved there was no mystery in buying of pippins.

20. In the case of the King v. Plume, Vent. 346. Hill. 31 & 32 Car. 2. B. R. it was said by Scroggs Ch. J. and Dolben J. to have been lately ruled, that a *coach-maker* is within the act of 5 Eliz.

21. Upon demurrer to an indictment, the sole question was, whether a *salesman* was within the statute of 5 Eliz. because it seemed to be a new trade. But resolved it was a trade then used, and so within the statute. Raym. 385. Trin. 32 Car. 2. B. R. the King v. Bishop. 2 Keb. 610. pl. 47. Hill. 21 & 22 Car. 2. B. R. the KING v. GREENWAY, the

Court conceived it no trade at the time of the statute.

22. A *pin-maker* was resolved within the statute. Arg. Show. 3 Mod. Rep. 241. Mich. 2 W. & M. in case of HOBBS qui tam, &c. v. YOUNG, 314. in case of HOBBS v. YOUNG. cites it as resolved 3 Jac. 2. in case of Mason v. Nightingale. S. C. cited

by the name of Morstyn v. Nightingale.

23. A *horner* is an ancient trade for the pressing of horns. Per Holt Ch. J. Show. 242. Mich. 2 W. & M. in the case of Hobbs v. Young. [320]

24. S. was indicted on this statute for using the trade of a *felt-monger*, not having been apprentice for 7 years. It was urged, that it is a business which requires no skill. Per Holt Ch. J. If in the indictment it be * averred to be a trade at the time of making the statute, we will not quash it; for whether it was a trade or no, or whether skill is required or not, is † matter of fact proper for the inquiry of a jury; and there are *many trades within the general words and equity of this act, besides such as are mentioned therein*. And the Court would not quash the indictment. 2 Salk. 611. pl. 2. Hill. 11 W. 3. B. R. the King v. Slaughter. 12 Mod. 311 S. C. accordingly, per Holt Ch J.——
* Where it is so averred, the Court cannot intend it not within the statute. 2 Salk. 611. Queen v. Harper.

† Sid. 269. pl. 21. Trin. 17 Car. 2. B. R. in the case of PLAIN v. PETTIT, where the question was as to the trade of an upholster. It was said and agreed, per Cur. that though it be matter of fact to be tried by a jury, whether this employment was used at the time of making the statute, or whether the defendant had used it, and to the proving whereof it is no evidence that a maid-servant sewed a bed, or that the maid-servant of a tailor sewed the pockets; yet this fact being found, the Court are judges whether an upholster, &c. are trades within the statute.

25. It was affirmed by Holt Ch. J. that the trade of a *wool-comber* is within the statute, though the contrary has been adjudged 4 Jac. 2. 12 Mod. 312. Mich. 11 W. 3. in case of the King v. Slaughter.

26. Exception was taken to an order of justices for discharging an apprentice, because it appeared upon the face of the order, that the master was a *collar-maker*, and non constat what the trade is,

is, nor that it is within the statute, like COMFORT'S CASE, where one was bound to a *mantua-maker*, when there was no such trade within the statute, nor at the time of the statute. 2 Salk. 490. pl. 53. Pasch. 13 W. 3. B. R. in DITTON'S CASE, but nothing was answered thereto.

27. Whether a *seamstress* be or not within the statute. See (K) pl. 2.

28. *Merchant taylor* is not within the statute. See (K) pl. 14.

29. It was moved to quash an indictment against a woman for using the trade of a *milleuer*, not having served an apprenticeship. But the Court refused to quash it, and Holt said it ought to be tried if it was within the statute or not; for it did not appear to the Court but that it might be a trade at the time of making the statute; and all trades are not enumerated in the statute, but yet they may be within the meaning. 11 Mod. 63, 64. pl. 5. Trin. 4 Ann. in B. R. Anon.

30. Whether the trade of a *barber-surgeon* is within the statute, was argued, but adjournatur. 11 Mod. 110. Pasch. 1707. 6 Ann. B. R. the Queen v. Standish.

31. One was indicted for using the trade of a *salter* contrary to the 5 Eliz. not having served 7 years apprenticeship. An exception was taken, that this mystery was not within the number of those mentioned in the act, and consequently not punishable by that statute. But it was answered, that this act had provided a very proper remedy for the advancement of trade; and therefore was not to be confined barely to those mysteries mentioned in the act; but where there are like trades, *that require knowledge and experience*, they are within the intention of it, and the mysteries mentioned in the act are only set down for examples. Accordingly the Court over-ruled this exception. Barnard. Rep. in B. R. 30. Mich. 1 Geo. 2. 1727. the King v. Lister.

32. A *rope-maker* was thought by Page and Probyn J. not to be a trade within the statute 5 Eliz. though Page J. said it might be otherwise of a *cable-maker*. 2 Barnard. Rep. in B. R. 225. Hill. 6 Geo. 2. the King v. Langley.

[321] (B) *What is an using a Trade within the 5 Eliz. cap. 4.*

8 Rep. 129.
a. S. C. accordingly, by the name of the Case of the City of London.

1. **T**HE making candles for a man's own use, or a servant's making them for the private use of his master, without making any sale of them, is not using the trade of a *tallow-chandler*, so as to be punishable within the intent of the act; for the sale is the wrong, and *trade* is in *tradendo*, which is to deliver over; per Coke, to which Foster and Daniel agreed. 2 Brownl. 289. Mich. 7 Jac. C. B. Waggoner v. Fish.

Show. 241.
Mich. 2 W.
& M. S. C.
argued. And
ibid. 266.
Trin. 3 W.
& M. ad-

2. Debt on the statute 5 Eliz. for using the trade of a *cloth-worker*, not being brought up apprentice; the jury found that the defendant was a *Turkish merchant*, and exported *woollen cloths* thither; and that he employed clothiers, who had served apprenticeships to work the cloaths in his own house at his own charge, and with his own materials,

rials, which he sent into Turkey as merchandize; but that the defendant never served an apprenticeship. Per Cur. the defendant is the trader, because he employs the rest, who work but as his servants, and the loss and gain is to be his: that this is a trading within the statute, because the cloth is not confined to be used in his family, but to be vended by way of commerce. 2 Salk. 610. pl. 1. Trin. 3 W. & M. B. R. Hobbs qui tam, &c. v. Young.

judged a using the trade within the statute, by 3 Just. contra Dolben. — Carth. 162. S. C. accordingly. — Comb. 179.

S. C. accordingly. — 3 Mod. 313. S. C. accordingly. — S. C. cited as adjudged to be an using the trade. Skin. 428. Arg. Pasch. 6 W. & M. in B. R. in case of the King v. Bugge.

3. If a man use to trade 14 days in one month, and then ceases and uses again 14 days in the next month, he is not punishable by the statute. 12 Mod. 642. Hill. 13 W. 3. B. R. Stretchpoint v. Savage.

(C) Service. What is a Service sufficient.

1. **I**N an information upon the statute of 5 Eliz. cap. 4. against one for exercising the trade of a *chandler*, not having been an apprentice to the same by the space of 7 years, it was holden by the justices, that forasmuch as he *had been apprentice to a taylor for 7 years*, which is one of the trades mentioned in the said statute, that the penalty thereof did not extend to him: but judgment was given against the informer; for it was holden clearly upon the said statute, that if one has been an *apprentice for 7 years at any trade mentioned within the said statute*, he may exercise any trade named in the said statute, although he has not been an apprentice to it. 4 Le. 9. pl. 39. Mich. 33 Eliz. in the Exchequer, Anon.

2. Moor was indicted at Hicks's-hall upon 5 Eliz. cap. 4. for using the trade of a weaver, not having served as an apprentice 7 years; the evidence was, he *served 6 as an apprentice, and had since as journeyman in the same trade worked above that time*; and by all the justices, the serving 7 years is sufficient either way; and the defendant was found not guilty; and so by Thompson for the defendant, it was resolved by Hale Ch. Justice at the nisi prius at Westm. for Middlesex, in the cause of the MAMME. But Offly said that 15 Car. 2. in FORTH'S CASE, at the Guildhall, it was held by Hale Ch. J. as party per pale, and no sufficient service; which was agreed if the service were not in the same trade. 3 Keb. 400. pl. 106. Mich. 26 Car. 2. B. R. the King v. Moor and Dibloe.

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3. If a man takes one to live *with him in the exercise of the trade for 7 years*, this is a sufficient qualification, though the party is never bound an apprentice; and he shall have equal privileges with one bound; per Cur. 12 Mod. 46. Mich. 5 W. & M. Master, Warden, and Company of Cutlers in Highamshire v. Buskin. the trade for 7 years to be sufficient without any binding, this being a hard law. 2 Salk. 613. pl. 7. Pasch. 5 Ann. B. R. The Queen v. Maddox.

Upon indictments on the statute of 5 Eliz. we allow in evidence the following:

But where one was indicted for using the trade of a *grocer*, and he offered to give evidence of his having exercised this trade for 7 years, as being matter tantamount to his having served an apprenticeship for that

that time, Ch. J. Eyres did allow, that the cases had gone so far as to allow a wife's living in the shop with her husband for 7 years to be equivalent to an apprenticeship, but thought the present case not strong enough to comply with the meaning of the statute. Accordingly the evidence was disallowed. *Barnard. Rep. in B. R. 367. Trin. 3 Geo. 2. The King v. Morrice.*

4. One brother living with another at the trade of a tallow-chandler for 7 years, may set up the trade, though there be no indenture; and he is a good apprentice within the statute of 5 Eliz. Per Eyres J. Comb. 254, 255. Pasch. 6 W. & M. in B. R. the King v. Coller.

A man that has served an apprenticeship beyond sea, is there by qualified

5. H. served 7 years as an apprentice beyond sea, but was not bound; this is sufficient to excuse him from the penalty of 5 Eliz. Per Holt Ch. J. at Surrey assises. Salk. 67. pl. 5. 10. Will. 3. Froth's case.

to use a trade in England. 1 Salk. 67. Pasch. 11 W. 3. B. R. King v. Fox.

So it was resolved *obiter*, by the Court upon the 5th of Elm. that serving 5 years to a trade out of England and 2 in England was enough, and satisfied the statute. But there must be a service of a full time either in England or out of England; therefore serving 5 years in a country where by the law of the country more is not required, will not qualify a man to use the trade in England. 10 Mod. 70. Mich. 10 Ann. B. R. The Queen v. Morgan.

6. A wife living with her husband 7 years, may after his death continue the trade; for the act does not require a man or woman to be an actual apprentice; but the words are *tanquam an apprentice*. 10 Mod. 70. Mich. 10 Ann. B. R. the Queen v. Morgan.

7. If a man lives with another that uses a trade, which other is not qualified for using it, 7 years, he may set up the trade as well as if he had lived with one never so well qualified. 10 Mod. 70. the Queen v. Morgan.

(D) Service. In what Cases a Man may use a Trade without Service, &c.

But 12 Ann. 23. enables disbanded soldiers to use such trades as they are apt for in any town or place within the

1. 5 Eliz. cap. 4. ENACTS, That, it shall not be lawful to any person to use any occupation, now used within England or Wales, except he shall have been brought up therein 7 years as an apprentice, nor to set any person on work in such occupation, except he shall have been apprentice, or having served as an apprentice will become a journeyman; upon pain of 40s. for every month.

countries where they were born.——At common law no man was restrained from working at any lawful trade, or using as many arts and mysteries as he pleased. 11 Rep. 54. Mich. 12 Jac. in the Taylors of Ipswich's case.—Show. 266. Hobbs v. Young. S. P.—Per Tirrel J. Cart. 118. cites Hob. 211. but says a custom may restrain, and cites 43 E. 3. 52.—Per Bridgman Ch. J. *ibid.* 120.

[323] Upon an issue joined, Littleton, recorder of London, certified ore tenus, that there was not

2. In an information against T. for using a trade different from that to which he had served an apprenticeship, he pleaded a custom in London, that every citizen and freeman of London may relinquish his trade wherein he has been an apprentice for the space of 7 years and exercise another trade; and the question was, if this be warrantable by the rules of law or no, inasmuch that before the statute of 5 Eliz. 4. which restrains it, it was lawful for

for every man to use what trade he would, although he had not been apprentice by the space of 7 years; and then it being the common law of the realm, that a man might use any trade although he had not been an apprentice for 7 years, it may not be alleged by way of custom in London, but it ought to have been shewed as the custom of the realm; for that which is the common law of the realm, is the custom of the realm. It was answered and agreed, that as this custom was alleged in this information, the allegation of it was warrantable in the law, and it may well be said to be a custom before the statute of 5 Eliz. for first, *the custom is restrained to a citizen and freeman of London*, so as he that is not a citizen and freeman may not enjoy the benefit of this custom; and it being restrictive of the common law, which gives power unto all, as well freemen as citizens to exercise what trade they will, stands well in custom, and may well be alleged by way of custom. 2. This is alleged to be the custom of London, and so is tied to a particular place; and howsoever it may be the common law of the realm in other places, yet in London, which is for the most part governed by their particular custom, it may well be said a custom; and so the plea in bar good enough as to this exception. Calth. Rep. 15, 16, 17. Hill. 12 Jac. B. R. Allen v. Tolley.

any such custom generally; for he said, that the custom is not that one brought up as an apprentice in the trade of a goldsmith, cutler, &c. being a freeman of London, by colour thereof may use any other manual trade; but one of a trade, who uses buying and selling, may exercise another trade of buying and selling. But this he did not mention in his

certificate, but generally that there is no such custom as is pleaded. Cro. C. 361. pl. 1. Pasch. 10 Car. B. R. The King v. Bagshaw. — S. P. certified accordingly by the recorder, with the difference of manual trades and trades of buying and selling, as mercer, grocer, &c. Cro. C. 516. Mich. 14 Car. B. R. in case of Appleton v. Stoughton. — See (H) pl. 1.

3. *Indictment for using the trade of a woollen-draper at F. in Suffolk, not having been apprentice to that trade for 7 years; the defendant pleaded the patent of H. 3. to London, that every citizen, &c. hereafter should freely trade tam per mare quam per terram, and said that he was a freeman of London, and so justified and traversed his using it aliter vel alio modo. Upon a demurrer, the Court held the traverse and also the plea ill, because the patent cannot be pleaded in bar of the statute; and though the customs of London are confirmed by parliament, yet this statute intends to include all but their custom concerning taking apprentices, and not their customs in general. And judgment for the king.* Sid. 427. Mich. 21 Car. 2. B. R. the King v. Kilderly.

Saund. 311. S. C. and was argued that the charter did not intend to grant any other liberty, but only that the citizens and freemen of London may sell their merchandises and reside where they

will, notwithstanding some cities and boroughs claim a liberty of excluding foreigners from selling and buying merchandises within such city or borough, as appears Cro. Eliz. 110. 352. Dy. 279. b. Co. 8. 128. and that that was the sole intent of the charter, as by the words thereof it fully appears, wherefore it was concluded that the plea was ill, and of such opinion were the whole Court. And judgment was given pro rege nisi, &c. and it was not moved afterwards ex parte defendantis.

4. 5 Eliz. is a negative statute, and no one shall exercise a trade against it unless by virtue of a custom, as the *widows of tradesmen* who by custom carry on the trades of their husbands, which the Court held not within the statute. 2 Salk. 610. pl. 1. Trin. 3 W. & M. B. R. Hobbs v. Young.

Show. 256. Per Eyres J. S. P. and S. C.

(E) In what Cases a Man may use several Trades.
And what Trades.

1. **A**N information was brought upon 5 Eliz. cap. 4. (for using the trade of a *dyer*, whereof he had not been an apprentice) at the quarter-session in Southwark, and was removed by certiorari and traverse taken; and upon the evidence it appeared, that the defendant was a *felt-maker*; and that the felt-makers for the space of 60 years last past have used to die felts; and many haberdashers deposed, that the colour dyed by them was better than that which was coloured by the common dyers. And it was adjudged by the Court, that that is part of their trade of felt-maker. And the jury found accordingly for the defendant. Noy, 133. Hunter v. Moone.

* Comb.
179. S. C.
and S. P.
Carth. 163.
S. C. and
S. P. so if
he keep

2. He that uses one trade cannot use the *trade of another for or about the same commodity* used in his own trade; as a * *coach-maker* cannot make the *wheels* of his own coaches; a *wheelwright* cannot use the *trade of a smith*. Per Holt Ch. J. Show. 267. Trin. 3 W. 3. B. R. Hobbs v. Young.

workmen to curry his own leather, this is against the statute, because it is he only who receives all the profits of the several trades, and the wheelright and the currier are but his servants.

Show. 242.
S. P. per
Holt Ch. J.
in case of
Hobbs v.
Young.—
S. P. cited

3. A *comb-maker* presses and smooths horns for his own use in his trade, this was held at the assises to be within the statute 5 Eliz. and the counsel were well satisfied with the judgment. Cited by Holt Ch. J. Comb. 180. Trin. 3 W. and M. in B. R. in the case of Hobbs v. Young.

by Holt Ch. J. as adjudged, because it was a distinct trade. 11 Mod. 190. 7 Annæ, B. R. in case of the Queen v. Prew.

4. A man is a *mercier* and he sells hats; and the party is apprentice to him as mercier, he may use the trade of a hatter (in the petty towns it is usual) because he served him who did so. Show. 242. Arg. in case of Hobbs v. Young cites it as a Shrewsbury case of Rotheram v. Morris.

5. A *serge-maker* cannot use the trade of a dyer to dye his own serges. 11 Mod. 189, 190. pl. 4. Mich. 7 Ann. B. R. the Queen v. Prew.

(F) In what Cases Securities given in Restriction of
Trade are good.

1. 28 H. 8. **N**O master, wardens, &c. shall cause any apprentice cap. 5. or journeymen, by oath or bond, or otherwise, that he after his term expired shall not set up nor keep any shop, house, or cellar, nor occupy as a freeman without licence of the master, wardens, &c. nor take of any such apprentice or journeyman, nor any other occupying for themselves, nor of any other persons for them after their years expired, any money or other things for their freedom or occupations other—

otherwise than is appointed in the act 22 Hen. 8. cap. 4. upon pain to forfeit 20 l. the one half to the king, &c. and the other half to the party that will sue, &c.

2. N. bound himself apprentice to a mercer at Nottingham, and after the master took bond of him not to exercise his craft in 4 years in Nottingham. In debt upon the bond, it was held that the action is not maintainable. Mo 115. pl. 259. Pasch. 20 Eliz. Anon.

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3. A bond conditioned that the obligor should not exercise the trade of a blacksmith in South-Mims in Surry, was held void by all the justices; because the condition is against the necessity of the commonwealth in some place within the realm. Mo. 342. pl. 379. Mich. 29 Eliz. Anon.

2 Le. 210. pl. 259. in C. B. Anon. but S. C. that the bond was void and

against law. — 3 Le. 217. pl. 288. Mich. 30 Eliz. S. C. in the same words. — But as was observed by Sir Bartholomew Shower in his argument in the case of the Taylors of Exeter v. Clarke, 2 Show. 357. this was an extra-judicial opinion.

4. In debt upon a bond of 30 l. the condition was, that if R. B. son to the defendant, *did use the trade of haberdasher, as journeyman, servant, or apprentice, or as a master*, within the county of Kent, within the cities of Canterbury and Rochester, within 4 years after the date, that then, if he pay 20 l. upon request, the obligation to be void. And all the justices agreed, that the condition was against law, and then all is void; for it is against the liberty of a free-man, and against the statute of magna charta, cap. 20. and is against the commonwealth, and cited 2 H. 5. & 5. And Anderson said, that he might as well bind himself that he would not go to church. And judgment was given against the plaintiff. Ow. 143. Mich. 43 & 44 Eliz. Claygate v. Batchelor.

Cro.E. 872. pl. 8. COLLEGATE V. BACHELER, S. C. and that to prohibit or restrain any at any time, or at any place, is against law. For as well as he may restrain him at one time, or at one place,

he may restrain him for longer times and more places, which is against the benefit of the commonwealth; and though the prohibition be not absolute not to exercise the trade, but that if he exercise it he shall pay 20 l. and so was said to differ from the case of 2 H. 5. 5. b. yet the Court said it was all one; for he ought not to be abridged of his trade and living. — S. C. cited Noy, 98. in case of JELLIET V. BROADE, by the name of LEGGATE V. BATCHELOUR. — S. C. cited All. 67. Trin. 24 Car. B. R. in case of PRUGNELL V. GOSCE, and agreed by Roll Ch. J. for law; but said, that if there were a consideration for the restraint, as the taking off braided ware, such bond or promise is good; and so it was adjudged in FROWARD'S CASE, upon a writ of error out of Bridgenorth. But a restraint general throughout England is void, notwithstanding a consideration.

5. The defendant, in consideration of so much by him paid to the plaintiff, *promised not to exercise the trade of a joiner in a shop, parcel of a house to him demised for 21 years, durante termino predicto*. All the Court agreed clearly, that as this case here is, for a time certain, and in a place certain, a man may be well bound and restrained from using of his trade; and so, by the whole Court, here is a good breach of promise assigned, which well intitles the plaintiff to his action, and that the declaration is good. And so, by the rule of the Court, judgment was given, and so entered for the plaintiff. 2 Bulst. 136. Mich. 11 Jac. Rogers v. Parry.

S. C. cited by Ld. Ch. J. Parker, Wms.'s Rep. 186. in case of MITCHEL V. REYNOLDS, that where such a contract is made upon a good and adequate considera-

tion, so as to make it a proper and useful contract, it is good. Though he said, that case is wrong reported, as appears by the roll, which he had caused to be searched; for it is B. R. Trin. 11 Jac. 1. Rot. 223. And said, that the resolution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration; and the stress lies on the words, as the case is here; though as they stand in the book they do not seem material.

Palm. 172.
Pasch. 19
Jac. B. R.
S. C. that
the plaintiff
had bought
as much

6. T. in consideration of 10 s. *promised to pay B. 100 l. if he thenceforward kept any draper's shop in Newgate-market; and adjudged good, and the plaintiff recovered.* Cro. J. 597. pl. 19. in case of *BROAD v. JOLLYFE*, cites Pasch. 18 Jac. *Bragg v. Tanner*.

goods of the defendant as came to 500 l. in consideration whereof the defendant made the promise; and resolved that the assumpsit was good, and judgment for the plaintiff.

* [326]

This judgment was afterwards affirmed in the Exchequer chamber, Mich. 17 Jac. Ibid. 597. —

Jo. 13. pl. 15. S. C. accordingly; and says it was affirmed by all the

Justices, except Tanfield, who said nothing against it. — 2 Roll. Rep. 201. *JOLLYFE v. BROAD*, S. C. but the cause was first in

C. B. and the judgment there affirmed in B. R. by Mountague Ch. J. Doderidge, and Chamberlaine J. but Haughton contra. — Mar. 77. pl. 121. Trin. 16 Car. C. B. S. P. cited by Littleton Ch. J. to have been adjudged in B. R. which seems to mean this case; but that if one be bound that he will not use his trade, it is no good bond. — Noy, 98. *JELLIET v. BROAD*, S. C. resolved, that the action well lies; for it was a voluntary promise for a good consideration, and is restrained to a place; otherwise had it been a general restraint, or upon a co-action, or without consideration.

the plaintiff declared, that the defendant was a mercer, and kept a shop in N. and had his shop furnished with old sullied wares, and the plaintiff had a shop there furnished with new and fresh wares; and in consideration the plaintiff would buy his wares, and pay for them such * prices as he paid when he first bought them, the defendant promised he would no longer keep any shop at N. and alleged he bought the defendant's wares, and paid 300 l. for them, the price the defendant bought them at, whereas the wares were then not worth 100 l. and yet the defendant, contrary to his promise, kept his shop there, and furnished it with new wares, &c. to the plaintiff's damage 500 l. On a verdict for the plaintiff it was said, that this promise being to restrain trade, was against law; but all, except Houghton J. held the assumpsit good; for that it is voluntary, and a man upon a valuable consideration may restrain himself from using his trade in such a particular place; and it is usual in London for one to let his shop and wares to his servant when out of his apprenticeship; as also to covenant not to use that trade in such a shop or street; so, for a valuable consideration, and voluntarily, one may agree that he will not use his trade; for volenti non fit injuria. Cro. J. 596. pl. 19. Mich. 18 Jac. B. R. *Broad v. Jollyfe*.

8. In debt against a surety in a bond to perform covenants, one of which was not to set up a trade in Cicester. To which the defendant demurred, because void, being encouragement of idleness; and the defendant's being a surety does not alter the case. Windham said, that an apprentice might be bound on this condition, as *HALL v. HAWS*, 9 Car. 1. when the † original taking and instruction is on these terms. But he doubted this case; for he said, to oblige a lawyer not to give counsel to any man in Salisbury was held void by Jones; and the Court inclined it was void here; but adjournatur. 2 Keb. 377. pl. 35. Trin. 20 Car. 2. B. R. *Ferby v. Arrowsmyth*.

† See pl 12.

Sty. III.
PRAGNELL
v. GOFF,
S. C. and
judgment
affirmed. —
S. C. cited
3 Lev. 242,
243. in case of Clerk v. the Taylors of Exeter.

9. A. in consideration that B. would marry her daughter, promised, inter alia, to assign over her shop in Basingstoke to B. and that she would not use her trade in Basingstoke any longer. Upon an action brought, the plaintiff had a verdict and judgment in C. B. and now that judgment was affirmed in B. R. Allen, 67. Trin. 24 Car. 2. B. R. *Prugnell v. Goffe*.

10. Debt on a *bond* conditioned *not to use the trade of a taylor in Exeter*, the defendant pleaded that he was an expert taylor, and skilful in that art; and that the plaintiff, pretending that no one, who was not a member of the company of taylors there, ought to use that trade there, did many ways vex and trouble the defendant, which to get clear of, he gave this bond, which is against law, and void; the plaintiff replied that the defendant sealed and delivered the said bond as his deed. And it was adjudged in B. R. that the bond, being only to restrain trade in a particular place, was good. Whereupon error was brought in the Exchequer-chamber, and this judgment was reversed, and the bond held void. But an *assumpsit*, upon a good consideration not to use a trade in a particular place, they held *would be good*; because in such case, damages only being to be recovered, the jury may assess the same, having respect to the consideration upon which the promise was made. But in this case all the penalty is forfeited, be the consideration what it will, and though the offence be never so little; and such promises upon good considerations have always been allowed in such cases because the jury may try of what value the consideration was, and what * damage the use of the trade is to the party to whom the promise was made; and cited several authorities. And the reversal was by the unanimous consent of all the justices. 3 Lev. 241. Mich. 1 Jac. 2. in the Exchequer-chamber. Clerke v. Taylors of Exeter.

2 Show. 345. pl. 353. Pasch. 36 Car. 2. B. R. the TAYLORS of EXETER v. CLERKE, in B. R. states it, that the condition of the bond was to pay 20 l. within a month after he shall use the trade of a taylor in Exeter, otherwise than as a journeyman; and if he leave the town on 40 days notice, then, &c. Adjudged, that the bond was good. But at the end of the case,

pag. 364. says, that in the Exchequer-chamber the bond was held void, and the difference between a bond and assumpsit agreed, because of the consideration, without any regard to the consideration implied in law, upon sealing and executing the bond; and so the judgment was reversed.

11. A bond recited, that whereas the defendant had assigned to the plaintiff a lease of a house and bake-house, in such a parish, for the term of 5 years. Now if the defendant should not exercise the trade of a baker within that parish, during the said term; or, in case he did, should, within 3 days after proof thereof, pay to the plaintiff the sum of 50 l. then, &c. The Court were all of opinion, (as the same was delivered by Parker Ch. J.) that a special consideration being set forth in the condition, which shews it was reasonable for the parties to enter into it, the same is good; and that the true distinction, in this case, is not between promises and bonds, but between contracts with or without consideration; and that wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is † general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive. Wms.'s Rep. 181, 182. pl. 44. Hill. 1711. Mitchell v. Reynolds.

* [327] 10 Mod. 27. 85. 130. S. C. accordingly. — † General restraints are all void, whether by bond, covenant, or promise, &c. with or without consideration, and whether it be of the party's own trade or not. Per Ld. Ch. J. Parker, in delivering the judgment of the Court. Wms.'s Rep. 185. Mitchell v. Reynolds.

The restraint must be upon good consideration, and the breach of it must apparently tend to the damage of the obligee, or otherwise the restraint is void, though for a particular place. Per Ld. Ch. J. Parker, 10 Mod. 133. in case of MITCHELL v. REYNOLDS. — For what does it signify to a tradesman in London what another does at Newcastle? And surely it would be an unreasonable thing to fix a certain loss on one side, without any benefit to the other; per eundem. Wms.'s Rep. 190, 191. in S. C.

12. In debt by A. against E. on bond of 100l. conditioned, that *whereas A. at the special request of E. is to take E. into her shop for her hired servant, to attend in her shop, and inspect her customers, and to assist A. in her trade of a linen-draper. And whereas the said A. consents to hire and take the said E. upon her express agreement, that after her leaving A.'s service she will not exercise such trade, either by herself or any other directly or indirectly, in any shop, room, or place, within half a mile of A.'s now dwelling-house in Drury-lane, or other house she may remove to; nor shall assist any other person to carry on such trade, &c. which agreement is the sole consideration of A.'s taking the said E. into her service.* The breach assigned was for assisting J. S. in carrying on the said trade within half a mile of A.'s house in Drury-lane, and verdict and judgment for the plaintiff, and afterwards affirmed in B. R. and afterwards in the House of Lords, with the unanimous opinion of all the 12 Judges, and with 40l. costs. 2 Ld. Raym. Rep. 1456. Hill. 13 Geo. 1. *Chefman v. Nainby.*

13. An action was brought on articles, by which the defendant agreed not to exercise a certain trade *within the weekly bills of mortality.* Judgment was given for the plaintiff. And in error brought it was said, that such agreement was determined to be good in the case of *JASPEN v. LAMPER*, Hill. 13 Geo. 1. and likewise in the case of *MICHEL v. REYNOLDS*; for which reason the Court affirmed the judgment directly. 2 Barnard. Rep. in B. R. 463. Trin. 7 Geo. 2. *Clerk v. Crow.*

[328] (G) Restrained, By Charter, Custom, or By-laws.

It was adjudged upon demurrer, that the inhabitants of the market-town may sell goods in another market-town, not prohibited by this statute;

for this extends only to such as are living in country towns, and come and sell their goods in market towns. 2 Lev. 89. Trin. 25 Car. 2. B. R. *Davis v. Leving.*

An indictment upon this statute set forth, that the defendants had sold earthen-ware in London, contra formam statuti; but it was quashed upon a motion, because the statute does not give justices of peace any jurisdiction to proceed in this matter at their sessions, for they are not so much as named in the act. 5 Mod. 149. Hill. 7 W. 3. *the King v. Clough & al.*

Provided, that this do not extend to any such wares to be sold by wholesale.

Provided also, that every freeman in such town corporate, or market-towns, dwelling within the same, may sell the said wares by retail as heretofore.

Provided also, that all persons may sell by retail, or otherwise, all manner of cloth, linen or woollen, of their own making, in every such town corporate or market-town as heretofore.

This

This act shall not be prejudicial to the privileges of the universities of Cambridge and Oxford.

2. Upon a return, that the custom of London was, that no person not being free of the city, shall, directly or indirectly, either by himself or any other, keep any shop inward or outward, for putting to sale any wares, &c. by way of retail, or use any art, trade, mystery, or handicraft, for hire, gain, or sale, within the city, upon pain of forfeiture of 5 l. it was resolved this was good by way of custom, but not by way of charter or grant to the city; and therefore no corporations made within time of memory can have such privilege, unless by act of parliament. 8 Rep. 124. b. 125. a. Hill 7 Jac. the City of London's case.

3. One found guilty of having used the trade of a *working goldsmith*, and a *working jeweller*, not having served as an apprentice to the trade, was committed in London; and being brought into B. R. it was shewn for cause why a procedendo should not be granted, that the declaration is founded on a by-law founded on a custom; and that if either be not in all parts good, the declaration is naught; and here the custom is certified in the negative, and is contradictory, and that the by-law certified is uncertain and unreasonable; for every stroke the defendant strikes is using his trade, and to pay 5 l. for every stroke is unreasonable. 2dly, That the declaration is not applied to the by-law, because *doing a thing one day is not a using to do it*, and the words *diversis vicibus* do not help it; nor is it said that he gained his living by the trade or sale of the commodity wrought, and the words *pro lucro* & *pro ficuo* do not help it; for perhaps he uses it to his private use, which is to his profit, though he sells it not. And that it is unreasonable a stranger be restrained by a by-law made 40 years ago, whereof he had no notice, and yet punish him for doing what the common law allows, viz. the getting his own living. Besides, it is said *non existens liber homo usus est arte*, &c. which is uncertain; for so every apprentice may be punished, he not being liber homo. The other side cited 5 E. 3. that a negative with an affirmative implied, is good, and that it is exclusive of strangers, and inclusive of citizens, and that the offence, and not the time of using the trade, is the matter; and as to the apprentice, he uses not the trade for himself but his master's benefit. The Court desired books, & adjournatur. Sty. 226. Trin. 1650. B. R. London (City) v. De-roy.

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4. In case, the plaintiff declared of a custom in Derby, that every butcher in Derby having served an apprenticeship for 7 years, might use that trade *absque damno alterius, vel ab altero*; but that the defendant not being a freeman, nor having served an apprenticeship, sold flesh in Derby on such a day, not being a market-day, by reason whereof the plaintiff could not sell so much as otherwise he might, *ad damnum*, &c. The defendant demurred, because the custom is not laid * positively, but only potentially, (viz.) that he might use that trade; besides, there is no by-law to restrain foreigners, and without a by-law, or a custom, any foreigner may sell in market-towns, except on the market-days. And as to the declaration

* See (H) Pl. 1.

that he sold flesh, it is not sufficient; for it may be a horse or a dog. And upon these exceptions judgment was given for the defendant. Lev. 262. Hill. 20 & 21 Car. 2. B. R. Wilmot v. Nixon.

See (H) pl.
4. S. C.

5. Custom that none shall trade in a town, besides persons free of the gilda mercatoria there, quære if good in any place, except London? 1 Salk. 203. pl. 2. Pasch. 4 Ann. B. R. Mayor, &c. of Winton, v. Wilks.

30 Mod. 131.
S. C. & P.

6. Restraints of trades by by-laws are 3 several ways. 1st, To exclude foreigners, and this is good, if only to enforce a precedent custom by a penalty; per Parker Ch. J. in delivering the opinion of the Court; and cited Cart. 68. 114. and 8 Rep. 125. But that where there is no precedent custom, such by-law is void; and cited 1 Roll. Abr. 364. Hob. 210. 1 Bulst. 11. and 3 Keb. 808. But said that the case in 3 Keb. is misreported; for there the defendants did not plead a custom to exclude foreigners, but only to make by-laws generally, which was the ground of the resolution in that case. 2dly, All by-laws made to cramp trade in general, are void; and for this he cited Mo. 567. 2 Inst. 47. 1 Bulst. 11. 3dly, By-laws made to restrain trade, in order to the better government and regulation of it, are good in some cases, viz. if they are for the benefit of the place, and to avoid publick inconveniencies, nufances, &c. or for the advantage of the trade and improvement of the commodity; and for this cited Sid. 284. Raym. 288. 2 Keb. 27. 873. and 5 Rep. 62. b. Wms.'s Rep. 184. Hill. 1711. B. R. Mitchel v. Reynolds.

See (D) pl. 3.

(H) Proceedings and Pleadings.

S. C. cited
Sty. 479. as
9 Car.
FLETCHER
v. BAG-
NALL, that
licitum fuit
for a Lon-
doner to use
any trade by
the custom of
London, was
adjudged to
be ill plead-
ed; and
though it
may be good
in evidence, yet it is not so in a return.

1. **I**NFORMATION for using the trade of a goldsmith, not having been apprentice to that trade; the defendant pleaded the custom of London, that one having been an apprentice there for 7 years, and made a freeman of London of any trade, may use any other trade in that city; and then pleads that he served an apprenticeship 7 years in the art of a cordwainer, and was made a freeman of London, and so justified. Upon demurrer it was objected to the plea, because it was * quod uti possit any other trade, and not quod usus fuit. It was answered, that this being alleged by way of custom in the city, and not a particular prescription, it was well enough; and to that opinion the Court inclined. Cro. C. 347. pl. 9. Hill. 9 Car. B. R. the King v. Bagshaw.

See (D) pl. 2.

* See (G) pl. 4.

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2. In action sur statute 5 Eliz. for using the trade of a grocer, the defendant pleads a former act depending in the Exchequer in bar, which should be in abatement; et per Curiam no respondeas ouster, but absolute judgment for the plaintiff as on plea in bar. 2 Keb. 716. pl. 102. Mich. 22 Car. 2. B. R. Smith v. Poyner.

3. Debt

3. Debt upon the stat. of 5 Eliz. for using the trade of making chartas pictas, anglice, playing cards, from the 23d of February till the 23d of January following, viz. per duodecim menses integras, not having served his time for 7 years. After verdict it was moved in arrest of judgment, that the computation here is by *kalendar months*, whereas by the statute it must be by *lunar months*; and for this was cited the case of the KING v. STOWBRIDGE, Mich. 6 W. 3. And if this should be construed, that if he used it for the time mentioned here, he must have used it for 11 lunar months of necessity, then it will be uncertain when they will begin the computation, and the defendant may be again charged for part of the time for which this recovery now is, and cannot plead this recovery in bar; and the right way had been to say, that from such a day per undecim menses prox' sequent' he used it. And per Cur. it would be fatal, but is *helped by the verdict's finding him guilty of 2 [12] lunar months* next after the 23d of February. And if a man use a trade 14 days in one month, and then ceases, and uses again 14 days in the next month, he is not punishable by the statute. 12 Mod. 641. Hill. 13 W. 3. B. R. Stretchpoint v. Savage.

4. In case, the corporation of Winchester declared, that Winton was an ancient city, &c. and that there was a *custom, that none but persons free de gilda mercatoria of the said city, should exercise a trade there, unless brought up apprentice to it within the said city*; that the defendant nevertheless did exercise, &c. Holt Ch. J. said that all people are at liberty to live in Winchester, and asked how they could be restrained from using the lawful means of living in a place where they had a lawful liberty to live? That this was the cause of making the stat. 5 Eliz. That such custom is an injury to the party, and prejudice to the public; that the *case of London differs*, because they have by custom the bringing up the youth of that city; and therefore they have power by custom to make infants apprentices, and to assign apprentices, and after such apprenticeships they are free, but other cities have no such custom: but this declaration is ill, because the *action ought to be brought by the gilda mercatoria*. 1 Salk. 203. pl. 2. Pasch. 4 Ann. B. R. Mayor, &c. of Winton, v. Wilks.

It was agreed that such custom in London might be good, because their customs are confirmed by many acts of parliament; but it was doubted if such custom was good in any other city or borough. But it was agreed per tot. Cur. that the declaration was

naught; for non constat that the corporation has any gilda mercatoria; nor does it appear who the homines liberi de gilda mercatoria are, so as they may be the whole corporation, or some part of them; and anciently the king's grant to have guildam mercatoriam, made them all a corporation, viz. all the whole vill. 3 Salk. 349. S. C. — 2 Ld. Raym. Rep. 1120. S. C. argued by counsel, and spoke to by the Court; and Holt Ch. J. said, he would give judgment for the plaintiff if he could tell why; but judgment was entered quod querentes nil capiant per billam, upon the exceptions to the declaration. — 6 Mod. 21. Mich. 22 Ann. S. C. says, note this action was not grounded on any by-law, nor for any penalty. And Holt Ch. J. said, it was a point not determined whether such a custom was good, though many corporations did pretend to it; and that some corporations pretended a right by custom to exclude foreigners, but he thought they could not support it. And the reporter says, that in Pasch. 4 Ann. judgment was stayed upon faults in the declaration; and the Court declined saying any thing upon the merits, which, they said, was a question of great consequence.

(I) Forfeitures for using a Trade by 5 Eliz. 4.

In an information for using the trade of a baker within the city of Norwich, not having served as apprentice for 7 years, it was said that

it seems no action accrues to the informer for a penalty arising upon this act within the city of Norwich; and upon this act the justices varied in opinion. Et sic adhuc pendet. Mo. 886. pl. 1245. Hill.

1. 5 Eliz. ENACTS, That *the forfeitures mentioned in this cap. 4. s. 39. Statute (excepting those otherwise limited) shall be divided betwixt the queen and the prosecutor; and all justices of peace, or any two of them, (1 quor.) and every head-officer, shall have power to hear and determine the breach of this statute, upon indictment or otherwise, and to award process and execution accordingly, and shall yearly in Michaelmas term by estreat certify into the Exchequer the fines which accrue upon this statute, in manner as they ought to do in other cases.*

S. 45. *Provided that all manner of amerciaments, fines, issues, and forfeitures which shall arise, &c. by reason of any offences or defaults mentioned in this act, within any city or town corporate, shall be levied, gathered, and received by such person or persons of the same city, or town corporate, as shall be appointed by the mayor or other head-officers mentioned in this act, to the use and maintainance of the same city or town corporate, in such case and condition as any manner of other amerciaments, fines, issues, or forfeitures, have been used to be levied and employed within the same city or town corporate, by reason of any grant or charter party from the queen's majesty that now is, or of any of her grace's noble progenitors, made and granted to the same city, borough, or town corporate, any thing or clause in this act to the contrary notwithstanding.*

14 Jac. Davison v. Barker. — Hob. 183. pl. 220. S. C. And Hobart Ch. J. said, that if the clause is to be understood so as that they are given thereby to the use of the city or town corporate, the consequence will be, that this information cannot stand, it being for the king and the informer; and he was of opinion that the word (forfeiture) in this latter clause was not to be understood of the main penalty of the law for 2 reasons: 1st, Because it was penned beginning with amercements, &c. which imports the forfeitures of the like, or less nature. Again, that it appoints them to be levied in such sort as other amercements, &c. granted to such cities are to be levied, which are of record, and due, as soon as they are imposed, and want nothing but the levying. Now fines, issues, and amerciaments are often granted to cities; and yet that could not extend to the like, growing upon suits, upon offences made by new statutes. Note, those are not due till there be a conviction, so the question is of the suit, and not of the levying. But no city has, or can have grant by charter of any penal law. And where it was urged, that the former clause did except from the queen the penalties otherwise appointed, which must needs be understood of these, there is in the statute s. 1. forfeiture given against him that departs without licence out of a work undertaken to him from whom he departs; at Coventry the Tummer assizes 17 Jac. Hobart justice of assize there, advised Stapleton to give judgment for the informer in the sheriff's court there.

(K) Indictments, or Informations, as to using Trades.

8 Rep. 129. b. S. C. cited accordingly, in the case of the City of London. — 13 Rep. 11. S. C. — 2 Bulst. 189. Hill. 11 Jac. in case of THE

1. INFORMATION qui tam on 5 Eliz. 4. because the defendant at S. the 1st December 3 Jac. and continually after till 12 Nov. 4 Jac. (which was until the day of the information) for the space of 11 months, and more, *exercised and occupied the art and occupation of a brewer*, being an occupation used within the realm 12 Jan. 5 Eliz. ubi revera, he did not exercise the said trade the 12 Jan. 5 Eliz. nor was ever brought up for 7 years, as an apprentice in the said art, contra formam statuti, &c. The defendant pleaded not guilty, and found against him; and

and after verdict moved in arrest of judgment, first, that the art of a brewer is not such a trade, the using whereof is prohibited by the statute; sed non allocatur; for *by the express words of the statute * it is reckoned as a trade or occupation.* And the words in the statute whereupon this information is founded, refers to the trade aforesaid. Cro. J. 178. pl. 17. Trin. 5 Jac. in the Exchequer, Shoyle v. Taylor.

KING AND ALLEN v. TOOLEY, it is said by Coke Ch. J. that the barons of the Exchequer held a brewer to be out

of the statute; for if they are divided into 10 parts, there are not 9 of them that have been apprentices; and that it was therefore adjudged for them, and affirmed.—Roll. Rep. 10. Pasch. 12 Jac. B. R. in case of THE KING v. TOLLIN, Coke Ch. J. cited S. P. to have been adjudged within the statute, because it is for the sustenance of man; and said it was affirmed in error.

A † public brewer ought to serve apprentice 7 years; otherwise he is within the statute of 5 Eliz. but not so of a private brewer in private houses. Upon an information against a public brewer upon the statute of 5 Eliz. it is sufficient in the count to declare that he was not a brewer at the time of making the said statute; and there is no occasion to say, that he did not then use any other trade; for although the statute is obscurely penned, this is the true sense of it; if he had used the trade of a barber at the time of making the said statute, it would not serve to excuse him for being a brewer. Panis & potus sunt duorum vitæ sustentacula; and therefore the law provides, that the brewer and baker shall be apprentices for 7 years. These trades also concern the health of the bodies of men; and the law does not suppose that unexperienced persons can direct or work at them; and the law judges that 7 years are a convenient and necessary time for instruction before such public employment. Jenk. 284. pl. 15.

† Cro. C. 499. pl. 4. S. P. agreed, in case of the King, &c. v. Fredland.

2. An indictment on the statute, for using a trade not being apprentice to it for 7 years; but it was quashed, because it did not set forth that it was a trade used at the time of the statute; for the Court as judges cannot take cognizance that it was, and the statute says (trade at this time lawfully used). Palm. 528. Pasch. 4 Car. B. R. Anne Stafford's case.

S. P. Keb. 473. pl. 88. Hill. 14 & 15 Car. 2. B. R. The King v. Hubbard.

T. was indicted for

exercising the trade of a mercer, not having been an apprentice; exception was taken, that it is said that it was a trade 13 Feb. 5 Eliz. whereas the parliament began 12 Feb. But the Court held it well enough, and it might have been † omitted that it was a trade 5 Eliz. for that exception is worn out. Comb. 288. Trin. 6 W. & M. in B. R. The King and Queen v. Taff.

† But 2 Salk. 611. pl. 3. says, it is a good exception that it is not averred in the indictment, that the trade therein mentioned was a trade at the time of making the statute. Trin. 4 Ann. B. R. The Queen v. Harper.—And the same term between the QUEEN AND CORNISH, it was moved to quash an indictment for using the trade of a seamstress, not having served as apprentice; and the Court refused, because it was set forth in the indictment to be a trade in England at the time of making the act; wherein the words are, any craft, mystery, or occupation now used. So that if this trade of a seamstress be not within the act, the defendant would have the advantage of it upon the trial. Ibid.—2 Ld. Raym. Rep. 1188, 1180. in case of the QUEEN v. HARPER, cites S. C. accordingly; and the Court refused to quash the indictment, because they said they could not take notice what was, or what was not, a trade within the statute.

It was moved to quash an indictment, for exercising the trade of a baker, the defendant not having served a legal apprenticeship. The exception took to it was, that the trade was || not laid to be used infra regnum Angliæ at the time of the act. The Court said the trade of a baker was within the words of the act; and no averment of the trade being used at the time of the act is necessary, but where the trade only falls within the general conclusion of the clause at last. Barnard. Rep. in B. R. 277. Hill. 3 Geo. 2. The King v. Munroe.

|| So in indictment for using the trade of a grocer. 2 Keb. 226. pl. 83. Pasch. 19 Car. 2. B. R. the King v. Hopkins, the indictment was quashed for that reason.—See 2 Barnard. Rep. 147. The case of the KING v. WINDGROVE, cited in the case of the King v. Britton.

3. Information for using the trade of a draper in Norwich, was quashed, because it was not averred that he did not use the same trade at the time when the statute was made. Hard. 54. Arg. in the case of HAYES v. HARDING, cites it as adjudged. Mich. 22 Car. Johnson v. Wilnerford.

Indictment for using the trade of a baker, not having served 7 years apprenticeship,

contrary to 5 Eliz. and does not say he did not use the trade at the time of making the act; and it was quashed, but agreed and declared by all the Court, that this exception should never be allowed for the future

future; and now they would intend that no man did use that trade at that time. 2 Show. 210, 211. pl. 218. Trin. 34 Car. 2. B. R. The King v. Green.

[333] 4. An alien was *indicted* for using a trade upon the statute 22 H. 8. cap. 13. But the indictment was quashed, because it was *not set forth that he was born out of the power of the commonwealth, but only that he was born out of England*; but Roll Ch. J. said, if it says that he is *alienigenus*, it implies all. 2dly, The indictment did *not say that he is an alien born out of England*; and this was held a good exception. Sty. 256. Pasch. 1651. Harman v. Jacob.

5. An indictment upon the statute 5 Eliz. for using the trade of a *draper*, not having served as an apprentice, &c. was quashed, because it was *said that he used the trade in the year 1653, and did not say in the year of our Lord*. Style, 448. Pasch. 1655. B. R. Anon.

S. P. Per Cur. Keb. 558. pl. 80. Trin. 15 Car. 2. B. R. the King v. Harlow.

6. Indictment on 5 Eliz. 4. for using the trade of a *currier*, *not saying that he had not served in any art, mystery, or manual occupation; but only that he had not served as a currier for 7 years*; which the Court conceived ill, and quashed. Keb. 473. pl. 88. Hill. 14 & 15 Car. 2. B. R. the King v. Hubbard.

7. It was moved to quash an indictment on 5 Eliz. for *using the trade of a hosier, in which he had not been educated, according to the form of the statute, (not saying, ut apprentitius,)* and a good exception; per Cur. and the indictment was quashed. Keb. 558. pl. 80. Trin. 15 Car. 2. B. R. the King v. Harlow.

* To an indictment for using the trade of a barber, without service of 7 years, exception was taken, be-

8. Exception was taken to an information by common informer, for exercising the trade of a barber, *not saying he set up publicly*; sed non allocatur, the statute being in the disjunctive. 2. It is not said * *contra pacem*; sed per Curiam, that is never done in suit by common informer; and if the defendant did not set up publicly, he may be found not guilty. Keb. 860. pl. 70. Hill. 16 & 17 Car. 2. B. R. v. Lufamoor.

cause *not laid contra pacem*. Holt Ch. J. thought it well enough, because it was laid *contra formam statuti*. But by the other 3 judges it was quashed; for every breach of a law is against the peace, and ought to be so laid. 6 Mod. 128. Pasch. 3 Ann. B. R. the QUEEN v. LANE. — S. P. Keb. 292. Pasch. 14 Car. 2. B. R. pl. 115. in case of the KING v. GROVE. — Ibid. 501. pl. 58. Pasch. 15 Car. 2. B. R. Indictment quashed on S. P. the KING v. LEVERINGTON. — Ibid. 789. pl. 43. Mich. 16 Car. 2. B. R. the KING v. HARRIS, S. P. — Ibid. 848. pl. 48. S. P. and the indictment was quashed. Hill. 16 & 17 Car. 2. B. R. the KING v. HOUSEDEN. — S. P. And the indictment quashed. 3 Keb. 646. pl. 63. Pasch. 28 Car. 2. B. R. the King v. Eeds.

† Indictment for using the trade of a butcher was excepted to, because it was *ad generalem sessionem pacis*, not saying *domini regis*. And per Cur. it was quashed. 2 Keb. 391. pl. 75. Trin. 20 Car. 2. B. R. the King v. Jackson.

9. Exception was taken to an indictment on 5 Eliz. 4. being *before justices ad pacem conservand*, and do *not say † domini regis*, sed non allocatur. 2. It was for *using the trade of mercator, Angl*, a merchant, sed non allocatur. 3. It was *not said where they were justices*, for which cause it was quashed. Per Twisden, the rest being absent. 2 Keb. 385. pl. 58. Trin. 20 Car. 2. B. R. the King v. Lambe.

Vent. 51. Anon. S. C. mentions it to be said,

10. Moved to quash an indictment upon 5 Eliz. cap. 2. for exercising a trade in *Chefbunt* in Hertfordshire, not having been an apprentice to it for 7 years, because the statute says they shall proceed

ceed at the quarter-sessions, and the word quarter is not in the indictment. Twisden, that word ought to be in; and I believe the using of a trade in a *country village*, as this is, is not within the statute. Moreton accorded. Rainsford said, it will be very prejudicial to corporations not to extend the statute to villages. Twisden said, he had heard all the judges say, that they will never extend that statute further than they needs must. Obj. further; that there *wanted these words*, viz. *† ad tunc & ibidem onerati & jurati*; for which all the 3 judges, Keeling being absent, conceived it ought to be quashed. 1 Mod. 26. pl. 69. Mich. 21 Car 2. B. R. the King v. Turnith.

that to keep a shop, within a country village is not within the statute; and that it were very inconvenient that the inhabitants must go to some great town upon every occa-

sion.——2 Keb. 583. pl. 121. Mich. 21 Car. 2. B. R. The KING v. FRENCH, seems to be S. C. for using the trade of a *grocer* in Cheston in Hartfordshire, being a country vill, and not a market town, and said the Court agreed that it was not within the statute, and that the statute is not to be extended by equity; and it was quashed.——S. C. cited 2 Barnard. Rep. in B. R. 225. Hill. 6 Geo. 2. in case of THE KING v. LANGLEY; and there Page J. said, that he had often known these indictments quashed upon such exception.

* 3 Keb. 790. pl. 45. Trin. 27 Car. 2. B. R. THE KING v. BONIVEL, the Court conceived the using the trade of selling grocery wares in small parcels 2 miles out of any corporation, and among many poor, to be within the statute 5 Eliz. But judgment was given for the defendant, because the indictment wanted the words *contra pacem*.——See 3 Keb. 782. pl. 28. The King v. Burnivil, S. C. but adjournatur.

† S. P. 2 Keb. 610. pl. 47. Hill. 21 & 22 Car. 2. B. R. The King v. Greenway.——See pl. 20. The King v. Morris.

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11. Upon a motion for quashing and indictment against a baker, these exceptions were taken. 1st, He is indicted for *using facultatem pistoris*, and does not say *panis humani*. 2dly, It is for *baking panis tritici, Anglice, household bread*; whereas it signifies only bread made of wheat, and not household bread, for that may be made of other corn. 3dly, For *baking panis assis*, without a dash for *panis assisæ*. Upon these exceptions it was quashed. Styl. 24. Pasch. 23 Car. Anon.

12. B. was indicted for using the art of a *brazier*, contra 5 Eliz. cap. 4. *not averring it a trade then*, and *ubi revera he had not served 7 years, according to the ancient custom in the town of Nottingham*. After verdict this was excepted to in arrest of judgment; and per Curiam, it is ill both in the averment, and also in drawing the necessity of service to a particular town; whereas it should be, that he had not served generally any where. 3 Keb. 550. pl. 55. Mich. 27 Car. 2. B. R. the King v. Boot.

13. Indictment for using a trade, *not having served 7 years apprenticeship in England or dominion of Wales*, was held naught; because limited to England or Wales, when the statute is general. 2 Show. 155. pl. 141. Hill. 32 & 33 Car. 2. B. R. Anon.

An indictment for exercising a trade, not having served to it

the space of 7 years, *infra regnum Angliæ aut Walliæ* was quashed for this exception, for it should be *aut Walliam*. 12 Mod. 251. Mich. 10 W. 3. B. R. King v. Fox.

14. In the case of an indictment for using the trade of a *merchant-taylor*, the Court seemed to think a merchant-taylor was nonsense, and unintelligible; they did not know what a merchant-taylor meant. 2 Salk. 611. pl. 3. Trin. 4 Ann. B. R. the Queen v. Harper.

S. C. & S. P. cited Ld. Raym. Rep. 1189. accordingly, that they could not

understand what a merchant-taylor is, and that there was no such trade. And the reporter says, note, Mr. Eyre said he had known many indictments on this statute quashed for that exception. And the reporter says further, that it seems to him that what a craft, mystery, or occupation is, is matter of law.

15. Two

15. Two cannot be indicted jointly for exercising a trade not having been apprentices, because they not being apprentices is that which makes the crime and forfeiture, and that must of necessity be several. 1 Salk. 382. pl. 32. Pasch. 5 Annæ, in case of the QUEEN v. ATKINSON, cited and admitted the case in 2 Roll. 81. [Indictment (N) pl. 6. Brooke's case.]

16. Baron and feme could not be indicted for exercising a trade, not being qualified, because it is the exercise of the husband. If the wife be qualified, that qualifies the husband, but still it is the exercise of the husband. 2 Ld. Raym. 1248. East. 5 Ann. Per Holt Ch. J. in the case of the Queen v. Atkinson, & al'.

17. It was moved to quash an indictment against a *serge-maker* for dying his own *serges*, he not having served as an apprentice to the dying trade; for that it was not said in the indictment, that he was a common dyer, and that he might lawfully dye his own wool. And it was said to be so adjudged in a case where, because it was not laid a common baker, it was held ill; for any man may bake for himself, and so he may dye, &c. But the Court held the indictment well enough, being not like the case of a baker, for many people bake their own bread; but a dyer is a separate trade. 11 Mod. 189, 190. pl. 4. Mich. 7 Ann. B. R. the Queen v. Prew.

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See (A).—
An excep-
tion was
taken to an
indictment
for using the
trade of a
cutler, be-
cause it was

18. An indictment for using the trade of a *salter* was excepted to, because it said that the trade was *infra hoc regnum usitat' at the time of the act made*. Now they said (*hoc regnum*) would as well extend to Scotland as England; and the averring that this trade was used in Scotland at the time of the act, would signify nothing. Upon this exception the Court quashed the indictment. Barnard. Rep. in B. R. 30. Mich. 1 Geo. 2. 1727. the King v. Lyfter.

said to be used *infra hoc regnum Angliæ at the time of the act*; whereas there is no such kingdom. It was answered on the other side, that this being a trade expressly declared within the act to be used at the time of the act, the clause of *infra hoc regnum* shall be rejected as surplusage; but adjournatur. 2 Barnard. Rep. in B. R. 147. Pasch. 5 Geo. 2. 1732. The King v. Britton.—Ibid. 172. Trin. 5 Geo. 2. S. C. The Court thought it so clear a point against the prosecutor, that they immediately gave judgment for the defendant. And Lee J. said, that the case of the QUEEN v. ROBINSON, Trin. 13 Ann. was the first determined on this point after the union.——In arguing this case, *ibid.* 147. for the defendant were cited the cases of the Queen v. Robinson, Easter, 1714. and the KING v. HOG. Trin. 9 Geo. 1. and the KING v. PARIS, determined on the case of the King v. Hog, and the case of the King v. Windgrove, Hill. 3 Geo. 2.

19. An exception taken was, that the indictment was in the borough of Colchester, and no county laid wherein that borough is. And 2dly, That the indictment only charges in general, that the defendant exercised this trade the first year of the present king, without saying in what month of the year it was. Now he said, the act of parliament gives so much a month forfeiture for the time the offence is committed, and therefore it was material for the indictment to have charged how many months the defendant exercised it. The Court said the first exception was clearly fatal, and therefore made the rule absolute. Barnard. Rep. in B. R. 285. Hill. 3 Geo. 2. the King v. Kendal.

See the
King v.

20. Indictment on the 5 Eliz. for exercising a trade, &c. It was moved in arrest of judgment that it does not appear when or where

where the jury were sworn; for the caption of the indictment is *Turnith, juratores pro domino rege jurat pro, &c. omitting the words adtunc* pl. 10.
& ibid. Hereupon judgment was arrested. *Gibb. 266. pl. 11.*
Pasch. 4 Geo. 2. B. R. the King v. Morris.

For more of Trade, in general, see *Actions tam quam, &c. Apprentices, By-Laws, Trade and Navigation, and the References there, and other proper titles.*

Trade and Navigation.

(A) Cases relating to Trade and Navigation.

See major part (A).

1. **I**F a ship freighted for a voyage be made use of for a longer voyage, or for several voyages, in case there be no protest against it, and the ship suffers any damage in the voyage not allowed of, the damage shall be equally paid. *Miege's Laws of Wisby, 15. f. 11.* Four joint-owners of a ship, 3 will navigate the ship, the 4th will not, the
*course is to go into the Admiralty, and there give security to answer for the ship if she be *lost, and they shall be discharged against the other. If one dislike the voyage and doth not expressly prohibit navigating the ship, and the ship goes the voyage and is lost, in such case he shall not be answered his part; but if the ship return, he shall have an account for what is earned, and it shall be intended a voyage with his consent, without any express prohibition proved. As if 4 are tenants in common of land, and one or more stock the land and manage it, the rest shall have an account of the profits; but if a loss come, as if the sheep, &c. die, they shall bear a part. Per North Ld. Keeper. Skin. 230. Hill. 36 & 37 Car. 2. in Chancery. Anon.——Vern. 297. pl. 291. Strelly v. Winsob, S. C. accordingly. For qui sentit commodum sentire debet & onus.*

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2. If there be several owners of a ship and they fall out, the ship notwithstanding this variance may make one voyage upon their common charge and adventure before they shall be so much as heard to dissolve the partnership; but if after that they cannot agree, he who desires to be free is to offer to the rest his part at a price as he will either give or take, which if he will not do, and yet refuses to sell the ship forthwith, the rest may rig the ship at their own charge and upon the adventure of the refuser so far as his part extends, without any account to be made to him of any part of the profit at her return. But they must bring her home safe or answer him the value of his part. *Molloy, lib. 3. f. 14. cites Lex Mercatoria, 120, 121.*

3. But if the partners who have the greatest share of the ship refuse to continue the partnership with one who hath but one part or a small share therein, and who cannot without great loss sell or part there-

therewith *at the price set, nor is able to buy their parts*, then they must all put the ship to an appraisement, and so dispose of her by sale, or setting her forth on the voyage according to such appraisement. Molloy, lib. 3. f. 14. cites Lex Mercatoria, 120, 121.

4. No subject ought to trade within any realm of *infidels* without licence of the king, because he may turn infidel. Per Coke Ch. J. and says, he had seen a licence in E. 3.'s time, reciting that he having special trust and confidence that his subject will not decline from his faith and religion, did *licence* him, &c. 2 Brownl. 296. Hill. 7 Jac. C. B. Michelborn v. Michelborn.

5. In an information the case was that the *Russia company* was incorporated in 1 and 2 Ph. and Mar. and it was granted to them, *that no person not being of their company should trade thither without their leave, under the penalty of forfeiting ship and goods*: afterwards by act of parliament 8 Eliz. these letters patents were confirmed, and it was enacted, *that no person subject or other, should trade thither without their leave*. The question was, whether a person free of their company might trade thither without their leave? The Court inclined to be of opinion that he could not; for the great inconvenience was the single and separate trade of those of the company, and not of foreigners, who could not trade without leave of the company, and *the act is a mere act of creation, and to regulate those of the company who trade separately to the prejudice of the joint-stock*; and if it was an act of confirmation, it would be void, because the letters patents themselves are void, being to appropriate a trade which the king cannot do by law. Hard. 108. Hill. 1657. in the Exchequer. The Attorney General v. Alum.

Keb. 38.
pl. 102.
S. C. accordingly,
and that it was the folly of the tenant in common, that he did not take collateral security for his 16th part. —
Lev. 29.
S. C. cites Litt. f. 222. but it seems misprinted for f. 323. —

6. In case the plaintiff declared that he was *owner of one sixteenth part*, and the defendant of another 16th part of the same ship, and that the defendant fraudulently and *deceitfully carried the said ship ad loca transmarina, and disposed of her to his own use*, by which the plaintiff lost his 16th part to his damage; on not guilty pleaded and verdict for the plaintiff, it was moved in arrest of judgment that the action did not lie; for though it be found deceptive, yet this did not help it, if the action did not lie on the subject matter. And here *they are tenants in common* of the ship; and by Littleton, between tenants in common there is not any remedy, and there cannot be any fraud between them, because the law supposes a trust and confidence betwixt them; and upon these reasons judgment was given quod querens nil capiat per billam. Raym. 15. Pasch. 13 Car. 2. B. R. Graves v. Sawcer.

But see now the statute 4 & 5 Anne, cap. 15. as to tenants in common.

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This case was communicated to me as taken from a MS. copy of the Lord Ch. J. Keyling.

7. Mr. Skinner's case preferred to the judges from the council-board. After a petition presented by him to the lords of the council, he stated his case as follows, viz. that in the year 1657, *when trade was open to the East Indies and free for all*, he set forth a ship of his own from London and arrived at Jamby in 1658, and possessed himself of a warehouse on the river side, on which his ship rode, wherein he put great part of his goods; he also had possessed a house at Jamby and goods therein, and purchased of the king of

Great Jamby to him and his heirs the islands of Baretha, and built a house and had contracted for the planting of pepper; that in the year 1657, *the agents of the East India Company* with above 30 men armed with muskets, swords, and half pikes, *set upon his ship, boarded her, and took her; they assaulted and took his warehouse and all his goods on shore, and with above 20 men armed as aforesaid, they assaulted his person at Jamby and wounded him and took him, broke open his house, spoiled him of his goods and papers, and the said agents, with men armed as aforesaid, did assault the islands of Baretha and possessed themselves of the same, built a house, cut down timber, and do still (as he believes) possess the same; and upon this case he propounded these questions:*

1st, Whether Mr. Skinner is not relievable properly in the constable and marshal's court? 2dly, Whether he can have a full relief in any ordinary court of law? Upon which, by an order dated the said 12th of April 1665, the king's majesty being present, the state of his case was sent to the 2 Lord Ch. Justices, and the Lord Ch. Baron and the rest of the judges then in town, to consider of the said questions and make a report of their judgment thereupon; upon which we met accordingly, and after advice made the report following.

1st, That we are of opinion that Thomas Skinner in the order mentioned, is not relievable for any of the matters in his case proposed in the constable or marshal's court, they having no jurisdiction in matters of this nature.

2dly, That his majesty's ordinary courts of justice at Westminster can give relief for the taking away and spoiling his ship goods and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas.

3dly, That as to the possessing and detaining of the house and islands in the case mentioned, he is not relievable either in the constable and marshal's court, or in any ordinary court of justice.

8. Upon an *information tam quam*, grounded upon the act of navigation, *for importing goods in a foreign ship* contrary to that act, the question was, whether or not, if a *foreign ship naturalized* by the new act, being a prize taken in the late war with Holland, be *afterwards sold to a foreigner, who sells her again to an Englishman*, whether or no the oath now must be taken again according to the new act. And adjudged that it need not, because that the ship was once lawfully naturalized. Hard. 511. Trin. 21 Car. 2. in the Exchequer, Martin v. Verdew.

9. A bill was brought to be *relieved against actions of trespass, for seizing their goods in the island of, &c. on the pretence of breaking an inhibition of the king of Denmark*, whereas by articles of alliance between the crown of England and Denmark, free trade was allowed to all English in all ports of the kingdom of Denmark, whereof the island was a port; but in regard *sentence was given in the court there* for the plaintiff on the seizure, the bill was dismissed. Chan. Cases, 237. Mich. 26 Car. 2. Bluet v. Bampfild.

10. In evidence, Hales Ch. J. said an *indebitatus* by one joint part-owner of a ship for his share of freight was *joint or several at*

the plaintiff's election; and evidence of the *custom of merchants* to bring it alone was sufficient, and one cannot release the other's part. Also if one takes * but a moiety or less of what belongs to his share for freight, yet the other may sue for his whole share of it, and so it was said to be held in the case of coal-merchants; but the matter ended by reference. 3 Keb. 444. pl. 63. Hill. 26 and 27 Car. 2. B. R. Stanley v. Ayles.

5 Mod. 193.
S. C. ad-
judged ac-
cordingly by
the whole
Court.—
12 Mod. 92.
S. C. ad-
judged.—
And by
Rookby J.

11. By the act of navigation 12 Car. 2. c. 18. *certain goods are prohibited to be imported here under pain of forfeiting them, one part to the king, another to him or them that will inform, seise, or sue for the same*; and it was adjudged in this case, that the subject may bring detinue for such goods as the lord may replevin for the goods of his villein distrained; for the bringing the action vests a property in the plaintiff. Salk. 223. Pasch. 8 Will. 3. B. R. Roberts v. Wetherall.

the very offence divests the property, though not then in the plaintiff, yet when the action is brought it is in him by relation. And judgment for the plaintiff. Comb. 361. S. C.

So where there were 37 consenters, and but 2 or 3 refusers, the Court denied a prohibition to a suit in the Admiralty upon the stipulation; for per Curiam, though by the law of England, 2 or 3 part-owners may hinder the others from sending the ship a voyage without their consent, yet the law of the Admiralty is

12. *Some part-owners of a ship were desirous that she should go to sea, and others would not consent*, upon which they procure the ship to be arrested by process out of the Admiralty, and compelled those who intended to send the ship a voyage to enter into recognizance there, conditioned for her safe return. After which the ship began a voyage and was lost, and upon this the persons bound were sued in the Admiralty. Prohibition was moved for. 1. Because the recognizance not being in nature of a stipulation, the Admiralty had not power to compel the party to enter in it. 2. Because this suit being in nature of debt upon a recognizance, that court had not cognizance of it. But the prohibition was denied by the Court (absent Holt Ch. J.) because this suit is between the part-owners of the ship, and the property is admitted; and therefore it is properly conusable there. 3. If the Admiralty had not power to take such recognizances all navigation must be obstructed if one obstinate part-owner would not consent that the ship should make a voyage; and e contra it is very reasonable that he have security that the ship return in safety, since he does not consent to the voyage. Ex relatione m^ri Shelley. Ld. Raym. Rep. 223. East. 9 W. 3. Lambert v. Aeretree.

otherwise. For there, for the encouragement of navigation, the Court of Admiralty will permit the ship to make the voyage, upon security given to bring her back safe. For it is reasonable that the others who oppose the voyage, should have some security for their ship. Then if the ship be lost it is at the peril of the adventurers, and they shall be suable upon their stipulation by the others in the Admiralty; for now it is not doubted, but the Admiralty may take stipulations. Ld. Raym. Rep. 235. Trin. 9 W. 3. Blacket v. Ansley.

But where there were 8 owners of the ship called the Upton Galley, 6 were desirous that the ship then lying in the Thames, should go on a voyage to, &c. the other 2 opposed it, thereupon the 6 libelled in the Admiralty against the others in order to obtain a decree of that court, that the ship should make the voyage, and the same was decreed accordingly; and that the 6 should enter into a stipulation to the other 2 for the safe return of the ship, which they did. The ship sailed and was lost in the voyage. The 2 sue the other 6, viz. Degrave, and 5 others, on this stipulation in the Admiralty. D. moved for a prohibition to stay this suit, upon suggestion of the statute of 13 R. 2. cap. 5. and 15 R. 2. cap. 3. and of the facts before alleged. But the Court thinking this point not fit to be determined on a motion, ordered the plaintiff to take a prohibition, and declare upon it, and then on the defendant's demurrer, the point would come judicially before them, and receive a more solemn determination. But Holt Ch. Justice said, that the Court of Admiralty might take stipulations for bail, and that they might proceed upon them, and

It was constantly allowed, though Co. 4 Inst. 135. is of another opinion; and yet such stipulations are as much within the words of the statute of Rich. 2. as the recognizance in this case. But the question in this case is, if by the custom of England the Admiralty has not such a jurisdiction; if it has, neither the statute nor common law will restrain them. 2 Ld. Raym. Rep. 1285. East. 6 Ann. Degrave v. Hedges.

For more of Trade and Navigation in general, see Court of Admiralty, Factor, Freight, Hypothecation, Mariners' wages, and other proper titles.

Traverse.

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(A) Notes and Rules.

1. **A** Traverse signifies in pleading the denying of some point, matter, or thing alleged on the other side, with an *absque hoc*, that such a thing was done or not. Heath's Maxims, 103. cap. 5.
2. When the *matter of a plea* is not good, there a traverse is not good; by the justices of both benches. Br. Appeal, pl. 122. cites 37 H. 8.
3. Where a *perfect bar* is pleaded, a traverse makes the plea double; for it requires a double answer. Arg. Litt. Rep. 15. cites 6 Rep. 24. HELLIER'S CASE, and 33 H. 6. 18. 22 H. 6. 42. 1 E. 5. 3. Co. Ent. Quare Impedit, 505.
4. If a man *pleads in bar*, and the plaintiff *replies matter in law*, he shall never traverse the bar. Arg. Litt. Rep. 15. in case of FENNER v. THE BISHOP OF LONDON, PASVIL AND MICHELSON, cites 5 H. 7. 14. per Hussey.
5. No traverse ought to be taken, but where the *thing traversed* is *issuable*. Cro. J. 221. pl. 3. Pasch. 7. Jac. B. R. in case of Bedel v. Lull.
6. When the defendant traverses any part of the plaintiff's count or declaration in a *quare impedit*, it ought to be such part as is both inconsistent with the defendant's title, and being found against the plaintiff, does absolutely destroy his title; for if it does not so, however inconsistent it be with the defendant's title, the traverse is not well taken; per Vaughan Ch. J. Vaugh. 8. Hill. 17 & 18 Car. 2. C. B. in case of Tuston v. Temple & al.

Ld. Raym. Rep. 41. in case of WAL-THAM v. SPARKES, Arg. cites Vaugh. 8. For if a man will traverse,

he ought to traverse that which will reduce the point in debate to a conclusion: and therefore the traversing an immaterial averment was ill, and it was so held.

7. If one will take a traverse to a declaration, he ought to *traverse that part of it, the doing whereof will make an end of the matter for which the plaintiff declares*, and then is the traverse good Pasch. 24 Car. 2. B. R. else not; for then it is to no purpose. 2 L. P. R. 589. tit. 'Traverse.

8. The *essential part of a traverse is but the denial of a material matter alleged by the plaintiff or defendant respectively*; the formal part is *absque hoc*. But that a traverse is good without the words *absque hoc*, is expressly resolved 1 Saund. 22. BENNET v. FILKINS. Arg. Ld. Raym. Rep. 356. in case of Pullein v. Benson.

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Sec (G).

(B) Of the *Inducement* to a Traverse.

1. **A** Traverse ought to have an *inducement to make it relate to the foregoing matter*, or else it is not good and formal. Mich. 22 Car. B. R. for else it cannot be known what is traversed thereby. 2 L. P. R. 587. tit. Traverse.

2. Where the *inducement to the traverse is ill, and the traverse is well taken*, this is good upon a general demurrer; but upon a *special demurrer* shewing this for cause, it is naught. 2 L. P. R. 588. tit. Traverse, cites Mich. 5 W. & M.

3. The *inducement to a traverse ought always to contain sufficient title, but it is not material whether the matter is true or false*. 3 Salk. 353. pl. 5. Pasch. 9 W. 3. Anon. cites Cro. C. 265, 266.

B. P. 3 Salk.
353. pl. 5.
Pasch. 9 W.
3 Anon.

4. Per Holt Ch. J. a man ought to induce his traverse, and the reason is, *because he ought not to deny the title of another till he shew some colourable title in himself*; for if the title traversed be found naught, and no colour or right appears for him who traversed, it would happen that no judgment could be given. 3 Salk. 357. pl. 12. Pasch. 9 W. 3. Anon.

5. Where a traverse goes to the matter of a plea, &c. *all that went before becomes inducement*, and is waived by the traverse; but where a traverse goes to the time only, what was set out in the plea before does not become bare matter of inducement, nor is it waived by the traverse; per Holt Ch. Justice. 2 Salk. 642. pl. 12. ... Ann. B. R. Green v. Goddard.

6. Inducement to a traverse is *insufficient where the traverse is a thing immaterial*. See Comyns's Rep. 302. pl. 155. Mich. 5 Geo. 1. C. B. Newland v. Collins.

See (S).

(C) *Traversable, what. Cause; in what Cases.*

1. **I**N assise, if the *warranty of the uncle, whose heir, &c. is pleaded*, it is a good plea that he *never had such uncle*. Br. Traverse per, &c. pl. 329. cites 44 Aff. 1.

2. A vill was indicted of the *death of a murderer, and that A. and B. had 100l. of the money of the offender, who was sued; and he who was supposed to have the money came and traversed the cause*,

cause, inasmuch as it was only an inquest of office. Br. Traverse per, &c. pl. 321. cites 47 E. 3. 26.

3. Issue was taken whether bond was taken for 10l. parcel of a contract of 20l. or for other cause. Br. Traverse per, &c. pl. 46. Br. Contracts
pl. 8. cites
S. C. cites 3 H. 4. 17.

4. If a man removes plaint of replevin out of the king's court for cause, and the defendant tenders to traverse the cause, and the other party demurs, and it is adjudged against him who traverses, this is peremptory, and the plaintiff shall recover; but the court will not suffer the traverse of the cause, unless in ancient demesne, as they said there. Br. Peremptory, pl. 79. cites 27 H. 6. 4.

5. In *præcipe quod reddat*, a man prayed to be received, and the other traversed the cause; and this was held jeofail; for he ought to traverse the reversion, and because he did not, therefore it is jeofail, as it was held. Br. Repleader, pl. 42. cites 33 H. 6. 39.

6. Trespass by W. Babington against N. B. *quare M. P. prisoner in the Fleet, in custodia querentis apud W. cepit*, &c. The defendant said that E. Venor was warden of the fleet at the time of the trespass, and that the prisoner was bound in a recognizance, and that the justices commanded E. Venor the same day to have the prisoner before them, by which the defendant, as servant of the said E. Venor, brought him to the justices to the court, and carried him back to the Fleet by command of the same justices, and as he was carrying him in Westminster, the plaintiff took him out of his possession, and he retook him absque hoc that he was warden at the time of the trespass. And by the opinion of the Court it is a good plea; for if he was not warden he cannot have action of the taking. Br. Trespass, pl. 305. cites 4 E. 4. 6. 9. [341]

7. The cause shall be traversed in several cases; as to cleanse the land by reason of tenure, he may say that he has not the land *per quam*, &c. or that the way is not a highway, or in battery of his servant, to say that he is not his servant, &c. Br. Traverse, per, &c. pl. 182. cites 5 H. 7. 3. Br. Present-
ment in
Courts, pl.
14. cites
S. C.

8. Where the cause of voucher is shewn, the cause is traversable. Jenk. 12. pl. 20.

9. The cause why the college of physicians fine and imprison ought to be certain, for it is traversable; for though they have letters patents and act of parliament, yet inasmuch as the party grieved has no other remedy, neither by writ of error nor otherwise, and they are not made judges, nor court given to them, but have authority barely to do it, the cause of their commitment is traversable in action of false imprisonment brought against them. 8 Rep. 121. Hill. 7 Jac. per Coke Ch. J. in the conclusion of his argument in Dr. Bonham's case. In assault,
&c. and false
imprison-
ment against
the censors
of the col-
lege of phy-
sicians for
fining and
imprisoning
pro mala
prax., they
set forth

their authority, and shewed the person and fact to be within their jurisdiction as censors; and per Holt Ch. J. this is not traversable in this collateral action, because they are made judges to hear and determine; and therefore not liable to an action for what they do by virtue of their judicial power; and wherever a statute gives a power to fine and imprison, the persons to whom such power is given, are judges of record, and their court is a court of record. Carth. 494. Pasch. 11 W. 3. B. R. Dr. Groenvelt v. Dr. Burnel.——And per Holt, as to that point in Dr. Bonham's case, it is only an opinion delivered, and not a resolution, and is not law. Ibid. Marg.——Ld. Raym. Rep. 467, 468. S. C. and same points accordingly.——12 Mod. 389. S. C. and same points.——And though the plaintiffs had no remedy in any other court, it does not follow that the fact upon which such conviction

is grounded is traversable in a collateral action, because the power which the consors have is given to them by the statute by which they are, as it were, a jury to try the fact whether the praxis is good or not. And if a jury find contrary to evidence, yet no action lies against them, because they are on their oaths; therefore what they find cannot be traversed, Carth. 494. Dr. Groenvelt v. Dr. Burnel & al'.

Raym. 199.
S. C. and by
Twisden J.
the pleading
is well, and
so is the
constant
practice.—
Vent. 101.
HAYMAN v.
TREVANT,
S. C. and
the traverse
was held

10. An action upon the *case* brought upon a bargain for corn and grass, &c. The defendant *pleads another action* depending for the same thing. The plaintiff *replies that the bargains were several*, absque hoc that the other action was brought for the same cause. The defendant demurs specially; for that he ought to have concluded to the country. It was insisted that when there is an affirmative, they ought to make the next an issue, or otherwise they will plead in infinitum; and accordingly judgment was given for the defendant. 1 Mod. 72. pl. 26. Mich. 22 Car. 2. in B. R. Haman v. Truant.

good, and allowed for putting the matter more singly in issue.

11. If a sentence of *deprivation* be pleaded, you need not shew the *cause*; it is not traversable, even in a visitation, when it is by the visitatorial power. Skin. 485. Trin. 6 W. & M. B. R. in case of Philips v. Bury, cites Rastall's Ent, fol. 1. 11 H. 7. 27. and 7 Co. Kenn's case.

1 Salk. 247.
pl. 2. S. C.
but S. P.
does not ap-
pear.

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12. In case for a *pound-breach*, and taking thence a mare impounded by the plaintiff for damage feasant, the defendant *pleaded* that he gave the plaintiff 6d. in *satisfaction* of the trespass, and that plaintiff accepted it, and gave leave to defendant to take the mare out of the pound, and that he took her accordingly, the gate being open, &c. Plaintiff *replied de injuria sua propria absque tali causa*. After verdict for the plaintiff, it was moved in arrest of judgment that the replication was ill, because the plaintiff should not have traversed the *cause* generally, but the *acceptance in satisfaction*. Sed non allocatur; for though such issue is improper, and had been ill on demurrer, yet it is aided by the verdict. Ld. Raym. Rep. 104. Mich. 8 W. 3. Cotsworth v. Betison.

13. *Cause for which a fine is set*, is never traversable. 1 Salk. 397. Trin. 12 W. 3. B. R. Groenvelt v. Burwell.

See Tres-
pass.

(D) Command.

1. THE command is not traversable unless in *special case*, where the command determines the interest of the other party. Arg.

2 Le. 215. in case of FULLER v. CRIMWELL, cites 13 H. 7. 12, 13.

See Thorn
v. Shering.
—Mann.
Secondary
informed the
Court, that
if it had
been in case
of a lease for
years, or
for life,

2. In *replevin*, the defendant *justifies*, for that J. S. was seised in fee of the place, &c. where; and that he, as his servant, and by his command, did take the cattle there *damage-feasant*, and so justifies. The plaintiff *replies*, and confesses it, but says that J. D. was seised in fee long before, and leased to him at will, absque hoc that J. S. did command him for to enter, and to take the cattle. Upon demurrer the only question was touching the validity of the traverse. And by the whole Court it was ruled good; for the plain-

plaintiff in this case could not traverse any other matter but the command. And so judgment was given for the plaintiff. 1 Bulst. 189. Pasch. 19 Jac. Horne v. Harrison. then in such a case the seisin of the other ought to have been

traversed, and not the command; and so it has been here adjudged before, but otherwise in case of a lease at will, as in this case; the Court agreed in this. 1 Bulst. 189.

3. In conusance for *rent in replevin* by bailiff, the command is not traversable, because that goes to the right. But in conusance for *damage-feasant*, the command is traversable in replevin; per Holt Ch. J. in delivering the opinion of the Court. Raym. Rep. 310. Hill. 9 W. 3. in case of Britton v. Cole.

(E) Dates and Delivery of Deeds.

1. **D**EBT against the successor of a parson upon a grant of his predecessor of an annuity with penalty for non-payment, and confirmation of the patron and ordinary, which bore date before the grant, and he declared the first delivery to be 4 days after the grant; and the defendant said that it was delivered the day that it bore date. And the opinion was, that it is no plea without traversing that it was not delivered after the grant; for it seems that the day is not traversable, but whether it was delivered after the grant, or not. Br. Traverse, per, &c. pl. 59. cites 8 H. 6. 6.—And so is 37 H. 6. 17, 18.—And see Fitzh. Bar. 131. the plea not good for default of traverse. Ibid.

2. Where the deed is pleaded, bearing date such a day, and the first delivery another day, and the other pleads release mesne, this is no plea without traversing the first delivery, &c. Per Judicium. Br. Traverse per, &c. pl. 186. cites 1 E. 4. 9. and Fitzh. Bar. 131. and 18 H. 6. 8.

3. And, per Townsend and Brian, if a man be bound the first day of May, and the obligee makes an acquittance to him bearing date before the bond, and delivers it after the bond, in debt, if he pleads this release bearing date before, and that it was first delivered after, he shall not traverse; and yet it shall be intended, that the release was delivered as it bears date prima facie; but the declaration of the delivery destroys the intent; quod nota. Br. Traverse, per, &c. pl. 186. cites 7 E. 4. 9. and Fitzh. Bar. 131. and 18 H. 6. 8. [343]

4. In quare impedit the plaintiff counted that W. N. was seised, and presented J. S. his clerk, who at his presentation, &c. and after, by his deed dated the first day of May, W. N. granted the next presentation to the plaintiff; and after J. S. died, by whose death the church is now void, and so it belongs to the plaintiff to present, and the defendant disturbed him. And the defendant said, that true it is, that W. N. granted to the plaintiff by deed, dated the first of May, &c. but this was first delivered the fourth day, &c. before which day the said W. N. granted to the defendant the next presentation; &c. And no plea, per Rede, Fineux, and Vavisor, because he did not traverse the plea, that the deed was not delivered the first day of May;

for it shall be intended, that it was delivered the day that it bore date, if other matter is not shewn to the contrary, as to allege primo deliberatum alio die, &c. But Keble, Bryan, and Towns- end contra; for the writ is but supposal, and therefore the bar, which is the matter in fact, is good without traverse; for he has confessed and avoided it. Br. Traverse, per, &c. pl. 186. cites 5 H. 7. 26.

Ld. Raym. Rep. 349. S. C. and it was debt on a bail bond. And ibid. 356. Holt Ch. J. said, that non an- tea would be a traverse in some cases, but not here; and that judgment was given for the plaintiff by the whole Court, for want of the traverse.—

5. In debt on bond the plaintiff declared, that the defendant, 20 die Novemb. acknowledged himself indebted, &c. The defendant plead- ed, that the bond was first delivered 30 Novemb. & non antea; and shews, the writ on which he was in custody was returnable quind' Martini, so that the bond was taken after there turn; and then relies on the stat. H. 6. The plaintiff demurred, and had judgment. The Court agreed, that mere matter of supposal, matter alleged out of due time, or immaterially alleged, is not traversable; but they held the 20 Novemb. to be an express allegation, and that the defendant's plea had made it material; for the validity of this bond turned wholly on the day of the delivery, so the defendant should have traversed the delivery on the 20th. And the Court held the non antea no traverse, because it is what cannot be rested upon, but the party must disclose further matter before he comes to conclude. 2 Salk. 628. pl. 2. Mich. 10 W. 3. B. R. Pullen v. Benson.

Ibid. 356. is a note at the bottom of the page, that Mr. Jacob said, the reason Holt Ch. J. gave was, that in this case one cannot conclude to the country, because there ought to be other matter alleged to make the date material; otherwise where that is the single matter of the plea.——12 Mod. 204, 205. S. C. and per tot. Cur. the plea was held ill; for here the date was material; for suppose the arrest was before the return of the writ, and after the return of the writ he took an ante-dated bond, this bond is void; and therefore the date is material, and ought to be traversed; wherefore the plaintiff had judg- ment.——3 Salk. 352. pl. 2. S. C. by the name of Buller v. Benson accordingly.

(F) Day or Time.

* [344] 1. **I**N trespass the defendant justified for common, and the plaintiff would have traversed whether he had common the day of the taking or not. But per Curiam, the day is not tra- versable in writ of trespass, nor in replevin, without special matter shewn. Contra, if he has common there once in the year, and not all the year. Br. Traverse, per, &c. pl. 44. cites 2 H. 4. 24. cites S. C.

† In replevin the defendant avowed for rent-service, &c. The plaintiff replied, that the taking was nocte ejusdem diei. The defendant rejoined, that it was tempore diurno absque hoc, that it was nocte ejus- dem diei. The plaintiff demurred, pretending that the traverse ought to be absque hoc quod cepit modo & forma, &c. generally; for that the day is not material in this action, nor in trespass. But resolved, absente Haughton, that the traverse is good; for where the parties are agreed on the day, as in this case, it is not sufficient, if found to be done at [another] day; but where they do not agree upon the day, if it be found or proved on any other day, it is sufficient; and there the traverse ought to be general, modo & forma. And in this case the defendant has not made the day material by his plea, that the distress was made in the night; and for rent-service he cannot distrain in the night, as he may for damage feasant, and therefore ought to have averred in tempore diurno. And so judgment was affirmed. Palm. 280. Pasch. 20 Jac. B. R. Heyden v. Godsale.——Palm. 150. S. C. but not S. P.——Hob. 265. S. C. but not S. P.——Godb. 247. pl. 345. S. C. but not S. P.——2 Bulst. 159. S. C. but not S. P.——Cro. J. 334. S. C. but not S. P.

2. Debt against a feme, the plaintiff counted of 10 l. that the defend- ant bought of him a bond of 20 l. in which N. her baron was bound; and

and counted, that she for 10 l. bought of him the bond the 2d of July, such a year; and she said, that she bought it of him the first day of July in the year aforesaid, at which time she was covert of baron of the same N. *absque hoc* that she bought it the day in the count; and held a good plea. Quod nota. Br. Traverse, per, &c. pl. 69. cites 19 H. 6. 9.

3. Where a man is bound to enter into such land peaceably before Michaelmas so that the plaintiff may bring assise against him, and he says, that such a day before the feast he entered peaceably; this is a good plea. But if the other says, that such a day the defendant entered by force, *absque hoc*, that he entered peaceably the day in the bar, this is not a good replication, for the day is not traversable; but shall say, that he entered with force *absque hoc*, that he entered peaceably; quod nota. And per Prisot, it is sufficient for the defendant to say that he entered peaceably before Michaelmas, without expressing any day; and the other may say that he entered with force *absque hoc*, that he entered peaceably, Prout, &c.. Br. Traverse, per, &c. pl. 140. cites 37 H. 6. 17.

4. Where the justification of the defendant lies in a special matter, there the plaintiff has election to maintain the traverse of the time, or to traverse the special matter; as in trespass anno 7. the defendant pleads a release anno 6. *absque hoc*, that he was guilty after the release; there the plaintiff may say non est factum, without maintaining the day or time; for if it be not his deed, he is not guilty any day. Br. Traverse, per, &c. pl. 230. cites 10 E. 4. 2.

5. In ejectment the defendant intituled himself by a copy granted 44 Eliz. The plaintiff intituled himself by copy granted 1 June 43 Eliz. The defendant maintained his bar, and traversed *absque hoc*, that the queen 1 June 43 Eliz. granted the land by copy, *modo & forma*, &c. The Court held, that the day ought not to be made material, unless the queen had granted by copy before the grant to the defendant; and the traversing the day, where it ought not, is matter of substance; because thereby he makes it parcel of the issue, which should not be. And so adjudged for the plaintiff. Cro. J. 202. pl. 2. Hill. 5 Jac. B. R. Lane v. Alexander.

Yelv. 122. S. C. and a diversity was taken by Yelverton, Arg. that where the act done may indifferently be intended at the one day or the other, there the day is not traversable.

able. As in case of feoffment by deed such a day, there the day of the feoffment is not traversable, because it passes by the livery, and not by the deed; and the livery is the substance, and the day only surplusage. But where a man makes his title by a special kind of conveyance, as in this case by a copy, there all contained in the copy is material, and the party cannot depart from it; for he cannot claim by any other copy than that which is pleaded. As 18 H. 6. 14. in action against J. S. for taking his servant, and counts by deed on Monday in such a week; it is no good plea to say, that the retainer was the Friday after, *absque hoc*, that the plaintiff retained him the Monday. And so of letters patents, the day and place are traversable, because they are the especial conveyance of the party, from which he cannot depart. But per tot. Cur. the day is not traversable; but whether the queen granted a copy to the lessor of the plaintiff before the copy granted to the defendant, and so the traverse should be *absque hoc*, that the queen granted *modo & forma* to the lessor of the plaintiff; and that the law is the same as to letters patents. But Fenner J. contra, for the reason rendered by *Yelverton. And by him and the Ch. J. it is aided by statute 18 Eliz. because it is only form; for if the jury find a prior grant to the lessor of the plaintiff, though at another court, it suffices, and consequently the day is not material in substance. But Williams J. contra; and adjudged by all but Fenner, that the traverse is ill; for thereby the jurors will be bound to find a copy at such a day, which ought not to be; and also it is matter of substance † not aided by the statute of 18 Eliz. — Brownl. 140. S. C. but seems a translation of Yelv. 122. — S. C. cited 2 Mod. 145. Arg. in case of Brown v. Johnson.

† See Holbeck v. Bennet, at tit. Time (G) pl. 1.

6. Where a traverse makes a day *parcel of the issue*, it is ill; as where plaintiff declared of a judgment obtained in such court on 1st May, and defendant traverses such judgment obtained on 1st May. Lev. 193. Mich. 18 Car. B. R. Dring v. Respals.

See (P) pl.
13. & 22.

(G) Inducement.

S. P. 3 Salk.
357. pl. 12.
Anon.

1. **T**HE *inducement to a traverse can never be traversed*, because that would be a traverse after a traverse, which would be not only infinite but absurd; because it would be to quit his own title, and fall upon the title of another. 3 Salk. 353. pl. 5. Pasch. 9 W. 3. B. R. Anon.

Jo. 92. pl. 5.
Hill. 1 Car.
S. P. in the
5th resolution,
in case
of Veale v.
Gatesdon.—
For the co-
win is the
material
thing. Arg.
Hard. 70. in case of the Protector v. Holt, cites it as adjudged Hill. 1 Car. B. R. [and seems to intend Beaumont's case.]

2. Debt against an *executor*, who *pleaded several judgments in bar, &c.* The plaintiff *replied*, that the judgments were *satisfied, and kept on foot by covin*, to deceive the plaintiff. The defendant traversed the satisfaction of the judgments. The plaintiff demurred, because the satisfaction was but an inducement to the fraud and covin, and matter of inducement shall never be traversed; and judgment was given accordingly for the plaintiff. Latch. 111. Hill. 1 Car. Beaumont's case.

See Show.
Park Cases,
219, 220.
S. C.

3. The *king may not traverse the inducement to a traverse* more than a subject; and though it is said in the *old books* that the king may traverse the inducement, this is *to be understood upon an office found*; for heretofore the subject could not traverse the king's title found by office, without inducing his traverse with a title on his part; in which case the king might traverse the inducement of the subject's title, but in no other, and so are the books to be understood. *But if the traverse be ill*, there the king may traverse the inducement, and so may a subject. Per Holt Ch. J. Skin. 657. Mich. 8 W. 3. B. R. The King v. the Bishop of Chester.

(H) Intention.

Lev. 86.
S. C. but
S. P. does
not appear.

1. **T**HE *taking insufficient bail, with intent to defraud the plaintiff of his just debt*, is not a matter traversable, and therefore ought not to be answered. Sid. 96. pl. 24. Mich. 14 Car. 2. B. R. Bentley v. Hore.

2. Trespass, &c. for breaking his close called the balk and the hade, and cutting and carrying away his grass. The defendant disclaimed any title in the plaintiff's land; but said, that he had a balk and hade next the plaintiff's; and in mowing his own, he *involuntarily, and by mistake, mowed some grass growing on the plaintiff's balk and hade, intending only to mow the grass on his own balk and hade*, and carry it away, *quæ est eadem, &c.* and that, before the writ sued out, he tendered 2s. in satisfaction, &c. And upon demurrer the plaintiff had judgment, because it appears the fact was

was voluntary; and intentions are not traversable, nor can they be known. 3 Lev. 37. Mich. 33 Car. 2. C. B. Basely v. Clerkson.

3. *Intention of an indenture* is not traversable, because the Court cannot know it but only by the words in the indenture. 3 Lev. 167. Trin. 36 Car. 2. Kidder v. West.

4. Intention in some cases is traversable, as if *A. be indebted to B. by bond and by simple contract, and pays money to B.* the intention to which debt it shall be applied, is traversable. 1 Salk 196. Mich. 5 W. and M. B. R. Griffith v. Harrison.

(I) *Matter or Thing alleged, or Matter or Thing not alleged.*

1. **A**N *absque hoc* ought to be taken to a thing expressly alleged before, and is induced with a former plea, viz. *ut prius dicit*, where he has shewn a cross matter contrary to the plea of the plaintiff. D. 355. b. pl. 33. Mich. 21 and 22 Eliz. in Sir Fra. Leak's case. It is a rule in law, that a man shall never traverse that which is not alleged in the plaintiff's declaration. Per Holt Ch. Justice. Ld. Raym. Rep. 64. Mich. 7 W. 3. in case of Powers and Cook.

Where a traverse is taken of a matter not alleged it is but form. Ld. Raym. Rep. 238. in case of Lambert v. Cook.

2. A man cannot traverse *disseisin with force, and detainer with force, where the plaintiff alleges disseisin with force only*; the reason seems to be that he shall not traverse that which is not alleged. Br. Traverse, per, &c. pl. 146. cites S. C.

3. In trespass upon 5 R. 2. the defendant said that *W. was seised and infeoffed him*, and gave colour to the plaintiff, and the plaintiff said that *W. was seised and infeoffed him*, *absque hoc, that he infeoffed the defendant before* that he infeoffed him, *et non allocatur*; for he traverses that which is not alleged in the bar, by the opinion; by which he said that *W. infeoffed him*, and after disseised him contrary to his own feoffment, and infeoffed the defendant, upon whom he entered, and was seised till the trespass; and there it is said that a *que estate* is traversable if both parties claim by one and the same man. Br. Traverse, per, &c. pl. 231. cites 10 E. 4. 6.

4. *Assumpsit*, the defendant granted to the plaintiff 1000 trees to be cut within 3 years, and afterwards they agreed that when the plaintiff had cut 800 no more should be cut within the 3 years, and that defendant promised, after the expiration thereof, in consideration of forbearance till after the 3 years, to give the plaintiff licence to cut them then, which he refusing, the plaintiff brought this action. The defendant pleaded, that before the promise supposed to be made, the plaintiff had cut down 1000 trees, *absque hoc, that at the time of the promise he had cut down 800 trees only*, &c. Upon demurrer it was objected, that the traverse was idle, and the plea had been good without any; for his saying that he had cut 1000 trees was a full answer, and would make an issue. But per tot. Cur. the traverse is good; for the plaintiff by alleging the cutting 800 trees only, which is a matter issuable, has given advantage to the defendant to traverse,

verse, as he has done; for every matter in fact alleged by the plaintiff may be traversed, and defendant by way of traverse may answer the matter * alleged in the same words as the plaintiff alleged them; and then the plaintiff by demurrer upon the bar has confessed the cutting 1000 trees which was his full bargain, and so no consideration to ground the assumpsit upon. Yelv. 195. Mich. 8 Jac. B. R. Tatem and Poulter v. Perient.

5. The matter alleged by the king in a writ of *ne exeat regnum* is not traversable. Comb. 53. in case of Merchant Adventurers v. Rebow. Arg. cites 3 Inst. 179. D. 176.

6. *Escape*, the defendant pleads recaption upon fresh pursuit. The plaintiff replies, *de injuria sua propria absque hoc that he retook, &c. upon fresh pursuit, et adhuc detinet*. The defendant demurs, and shews for cause, that the plaintiff had traversed matter not alleged in the plea, viz. quod adhuc detinet, which ought not to be; for if the defendant has suffered J. S. to escape a month after the recaption, yet the plaintiff shall be barred by the recaption for the old escape, and shall have a new action for the new escape: quod Holt Ch. Just. negavit, for both are but one escape. Judgment for the plaintiff. Mr. Nott. 1 Ld. Raym. Rep. 39. East. 7 W 3. Meriton v. Briggs.

8 Mod. 136.
Bowers v.
Cook. S. C.
adjudged,
that the de-
fendant need
not traverse
that she was
executrix, or
ever admi-
nistered as
such.——
Carth. 363.
Mich. 7 W.
3. B. R.
S. C. and
per Cur. the
plea is better
without such
traverse.——
Holt Ch. J.

7. But in debt upon an obligation against the defendant as executrix of J. S. the defendant pleaded that J. S. died intestate, and that administration was committed to her, and petit *judicium si ipsa ad billam prædict. respondere debeat, &c.* Upon this the plaintiff demurred, and insisted that the defendant should have traversed *absque hoc, that she intermeddled before administration* committed to her; for if she did, she made herself liable as a tort executrix; and cited 3 Cro. 566. 810. 102. 3 Leon. 197. Yelv. 115. Brownl. 97. Holt Ch. J. and Cur. such a traverse had been ill; for such intermeddling is not alleged, and the defendant ought not to traverse that which the plaintiff does not allege in his declaration. 1 Salk. 298. pl. 9. Trin. 9 Will. 3. B. R. Powers v. Coot.

——— Ld. Raym. Rep. 63. Powers v. Cook, accordingly per
1 Salk. 297. pl. 8. Mich. 7 W. 3, in B. R. Fowler v. Cooke, S. P. and seems
to be S. C.

(K) Names, &c.

1. **I**N præcipe quod reddat R. G. came and tendered his law of non-summons, and at the day came one R. G. ready to have made his law, and the demandant said, that he is son of the tenant and of the same name, and a good averment, and the demandant had judgment to recover, for the father shall not change his name for the son; but per Herle, if the son be tenant and be ousted by this judgment he shall have assize. Br. Traverse, per, &c. pl. 349. cites 9 E. 3. 20.

Br. Trespas,
pl. 305. cites
S. C.——
S. C. cited

2. If a man brings action, as warden of a prison, parson of a church, abbot, or the like, and the action is founded by this name; it is a good plea that he is not warden or parson, or is not abbot; but

but he makes title pro forma, absque hoc that the plaintiff is warden, parson, or abbot, &c. Br. Traverse, per, &c. pl. 334. cites 4 E. 4. 6. 9.

Arg. Lane, 18. in case of Richards v. Williams.

3. A man was *outlawed* and taken *as mainpernor*, and said that he was dwelling at another vill absque hoc, that he was ever mainpernor, and per Cur. he shall not have such traverse; but *may say that there were 2 of the name, and the other was mainpernor* and not he. Br. Traverse, per, &c. pl. 317. cites 21 E. 4. 71.

4. In *trover* and conversion of barley, defendant *pleaded that the dean, archdeacon, president, and chapter of L. were seised of a parsonage in fee, and by the same name leased it to him.* Plaintiff replied *that the archdeacon and chapter of L. were seised in fee, and leased it to him, absque hoc, that there was any such corporation as dean, archdeacon, president, and chapter;* the defendant demurred. The point was argued. Tanfield Ch. B. seemed to think the traverse was not good; but Baron Herne seemed that it was; but he was once of counsel with the plaintiff; and it was moved that the case should be compounded. Lane, 18. Pasch. 4 Jac. in the Exchequer. Richards v. Williams. [348]

5. The defendant was *sued by the name of John;* and he *pleaded, that he was baptized by the name of Benjamin;* and *traversed, that ipse idem Johannes was ever known by the name of John;* and upon a general demurrer Holt Ch. J. said, this traverse is *repugnant* in itself, and very immaterial, for it had waived the precedent matter of baptism, which was well pleaded, and was now become the substance of the plea itself, for now the issue must be by what name the defendant was called or known, and not by what name he was baptised; whereas he *ought to have replied on his name of baptism and concluded with it without a traverse;* for a man can have but one name, therefore it implies a negative in itself, without saying he was never known by the name of John, &c. 3 Salk. 351, 352. pl. 1. Hill. 1 Ann. Anon.

(L) Offices, Presentments, &c.

1. **F**ALSE *presentment* taken before justices in a forest was *traversed* in B. R. and scire facias thereupon against the party who made the claim before the justices of the forest. Br. Scire Facias, pl. 105. cites 21 E. 3. 48.

Br. Forest, pl. 3. cites S. C. — But presentment before justices of

the forest in swanimote by foresters, verderors, regarders, and agisters is not traversable before justices in eyre. Br. Presentments in Courts, pl. 4. cites 45 E. 3. 7. — Br. De son Tort. pl. 7. cites S. C.

*Presentment before a steward of a forest and verderors, or in a *lect* is not traversable, per Thorpe, if it does not touch *franktenuement* or inheritance, and then he *ought to make title*, and not to traverse it generally. And so it seems always that he who will traverse *against the king* shall make title. Br. Assise, pl. 459. cites 50 E. 3. and Fitzh. Assise, 442.

* See pl. 6.

2. If a man *flies for felony* which is found before the coroner, this shall not be traversed; for this is an ancient law of the coroner; *contra* to say that he was *not felo de se*, this may be traversed. Br. Corone, pl. 150. cites 8 E. 4. 4.

Br. Traverse de Office, pl. 36. cites S. C. —

The coroner's inquiry

tion finds a man felo de se. The question was, whether or no this was traversable?

And the Court inclined —

inclined that it was ; for (per Hale) the reason why an inquisition, that finds a *fugam fecit*, is not traversable is, because all the parties that were present at the death of the party are bound to attend the coroner's inquest, and their not appearing there is a flying in law, and cannot be contradicted ; but that reason does not hold in *felo de se*. Freem. Rep. 419. pl. 556. Mich. 1675. Anon. — 2 Lev. 52. Mich. 27 Car. 2. B. R. The King v. Aldenham, such traverse was granted by Hale, Twifden, and Wild, *silente Rainsford* ; but it was said that a *fugam fecit* found before the coroner is not traversable.

3. The statute which gives traverse is only of ward, and of fine for alienation, which are only chattles, and of those there was no traverse at common law ; but of franktenement, traverse was at common law. Br. Petition, pl. 15. cites 9 Ed. 4. 51.

Vis. That it was not before the statutes of

34 [E. 3.

Stat. 1. cap. 14.] and 36 E. 3. [Stat. 1. cap. 13.]

4. Note, it was touched that traverse of a thing real was not at common law, but petition or monstans de droit. Contra of chattle. Br. Petition, pl. 30. cites 13 E. 4. 8.

[349]

5. The attorney of the king, when a man traverses an office, may maintain the office, or traverse the title of the plaintiff, though the plaintiff after his title traversed the office. Br. Traverse, per, &c. pl. 246. cites 13 E. 4. 7.

Br. Presentment in Courts, pl. 15. cites S. C. —

6. Presentments of nuisance, or in leets, &c. which touch the person, and do not touch any franktenement, shall not be traversed. Br. Traverse, per, &c. pl. 183. cites 5 H. 7. 3.

But if they touch franktenement, there a traverse lies. Br. Traverse, per, &c. pl. 183. cites 5 H. 7. 3. And in cases where process shall be made, there lies a traverse thereof ; which Brooke says seems to be good reason ; for it is in vain to make process, if the party shall not have answer when he comes. Br. Traverse, per, &c. pl. 183. cites 5 H. 7. 3. — Br. Presentment in Courts, pl. 15. cites S. C.

It was said by Hale Ch. J. that if there be a presentment in a leet for a personal misdemeanor, or in a *swanimote* concerning vert or venison, if it pass that day it is a conviction, and conclusive ; but if it be for a nuisance, or any matter that concerns freehold, the party may come afterwards and traverse. Freem. Rep. 339. pl. 422. Trin. 1673. Anon.

Per Wild : The presentment in leet is not traversable, unless the same day, because every resistant is presumed present. Twifden J. contra ; where freehold is in question, presentment may be traversed at any time ; and so where remedy is given in leet by statute. 3 Keb. 646. pl. 62. Pasch. 28 Car. 2. B. R. Elliot v. Bluck. — See the note to pl. 1.

7. An office is found, that A. died seised of the manner of B. and held the same in capite by knight service, his heir within age ; this office is traversed that A. infeoffed him, who traverses, in fee, and traverses the dying seised : whereupon the king takes issue, and hanging the traverse it is found by another office, that the said feoffment was by collusion, and after the issue was found against the king ; whereupon by the rule of the Court, the party had judgment, and an amoveas manum ; for the office, found depending the traverse shall not grieve the party, for so he might be infinitely vexed ; but in a *sci. fa.* by the king upon the latter office, he shall answer, &c. (An excellent case for the benefit and speed of them that are given to traverse.) 2 Inst. 693. cites 11 H. 4. f. 8. 13 H. 4. tit. Traverse, 16. and 13 H. 4. tit. Livery, 21. 13 H. 4. 6, 7. tit. Traverse.

8. It was found by office, that A. died seised of estate tail, which descended to B. his son and heir. This office was traversed, *absque hoc* that he died seised of estate tail ; and found for the king in B. R. It was moved in arrest of judgment, that the dying seised of estate tail

tail is not traversable, but the gift according to 15 E. 4. 2. 14 H. 7. 22. 15 H. 6. by which it was an ill issue; and this is not aided by the statute of jeofails, it being in case of the king, and not between party and party. But it was resolved per tot. Cur. that the traverse here is good; for it is the office intitles the king to the wardship, and not the gift; and the effect of the office ought to be traversed, because it is not the right of the party that gives wardship to the king, but his dying in possession; for were it not for the statute 32 H. 8. which gives to the king the 3d part after alienation, there ought to be a dying seised of the tenant to intitle the king to the ward; but *in an action which questions the right of the tail, as formedon*, there the gift only is traversable. And judgment for the king. Palm. 330. Hill. 20 Jac. B. R. Young's case.

9. It was found by office, that A. was seised of Bl. Acre in M. and Wh. Acre in N. held in socage; and also of a piece of ground inclosed out of the manor of O. and that A. had 5 daughters, and that J. S. married one of them, and found the descent of the lands, &c. J. S. traversed the office in 3 points. 1st, He pleaded demise [devise] to him by A. absque hoc that the lands descended. Several exceptions were taken to it. 1st, Because the heir shall not be received to traverse his own title found for him; and cites † 27 Aff. 1. that the heir may traverse the tenure, but not his title; and that this is often put for a rule in Staund. Prerog. and Dyer, 366. [Vernon's case] accordingly. 2dly, That the traverse is repugnant, because he did not plead entry after the demise [devise] and so it descends; and that therefore he should have pleaded the demise [devise] *without taking traverse. 3dly, That as to the lands inclosed, it is not good to say absque hoc, that they descended, without making title to himself. 4thly, That all the coheirs ought to join by the common law, and the statutes which give traverse, give it to all that are grieved, and they ought to join; and cites 42 Aff. 23. of jointenants. 5thly, That the venire fac. was from M. N. and the manor of O. whereas it ought not to be from the manor of O. because the parcel of ground is severed from it by the disseisin. But it was resolved by Lea Ch. J. and Doderidge and Haughton J. for the plaintiff as to all, and they said, 1st, that the † venire is good; for the possession only is severed from the manor, but this parcel is not severed in right by the disseisin, nor is the situation altered thereby. 2dly, That § descent may be traversed, and cited 5 Eliz. D. 221. that this prevents remitter; and so 49 E. 3. Cooch's case of escheat. 3dly, That he may traverse the descent in this case, || without making title, and that for the mischief which otherwise might happen; for the office here found a seisin of the socage land, and of parcel held in capite, whereas in truth he did not die seised of this parcel; so that if the disseisee [devisee] cannot traverse it, his devise shall be destroyed for 2 parts; and therefore he shall not be constrained to make title. 4thly, The coheirs need not all join in the traverse, it being to their disadvantage, and J. S. claims as purchaser to their disinherittance. But had he claimed as heir, all should join, because

* [350]

2 Roll. Rep. 351. THE KING v.

SUMMER, S. C. and is

almost the same with

this of Palm.

but so much misprinted,

that in some places it

would be difficult to

find out the meaning

without the help of Palm.

But in Roll it is (devise)

throughout, as Palmier is

(devise).

† 2 Roll. Rep. cites

37 Aff. pl. 2. But both the

books seem to be mis-

printed, and that it

should be 37 Aff. pl.

11. ———

† And 2 Roll's Rep.

351. Haughton J. said

there is no certainty,

but only that the par-

cel was (in-

closed out of the walls

of the manor), and therefore

when issue

is joined
thereupon,
the venue

cause they claim by the same title. Palm. 372. Trin. 21 Jac.
B. R. Sumner's case.

ought to come de manerio, since it cannot be from any other place, to try this part of the issue.

§ Godb. 410. pl. 489. SUMMER'S CASE, S. C. and by Doderidge J. regularly you shall not traverse the descent, but the dying seised. But in this case it ought to be of necessity, viz. in case of a devise the traverse must be of the descent; for here they cannot traverse the dying seised, for if they traverse the dying seised, then they overthrow their own title, viz. the devise. But here in case of a will, the party shall traverse the descent; for he cannot say, that it is true that the lands did descend, and that he devised it, &c. The heir cannot traverse that which entitles him by descent; but here his title is by the devise, and not as heir.

¶ Though the rule is generally true, yet here it does not hold by reason of the mischief; for the case is not that the father died seised of socage lands, and devised them to J. S. or to his eldest daughter, having 5 daughters, and died; but the office finds that A. was seised of this and other lands in capite, when in truth he did not die seised. 2 Roll. Rep. 351, 352.

Het. 71. S. C.
CHICHESE-
LEY v. THE
BISHOP OF
ELY, but
S. P. does
not appear.
—Hutt. 96.
S. C. ad-
judged that
the title of
the plaintiff
being tra-
versed, it
ought to
have been
maintained;
and that it
appears fully
that the
king is en-
titled to this
presentation,
though no
office had
been; and so
the denial of
the office
not mate-
rial. And
the defend-
ant had
judgment.

[351]

10. *Quare impedit*; the plaintiff shewed that A. was seised in fee of the advowson, as in gross, and presented M. and died seised, which descended to B. the plaintiff's husband, who 9 Mar. 8 Jac. by a deed granted it to D. and E. in fee to the use of the plaintiff for her jointure, and after of himself in tail, and died seised, and that the church became void by the death of M. and so she ought to present. The defendant said he was parson imparsoner of the presentation of the king, and shewed, that the plaintiff's husband died seised in fee, as of an advowson in gross, and of the manor of P. his son and heir within age, holden of the king by knights service in capite, and that an office found the tenure and descent; whereupon the king was seised, and presented the defendant, who was instituted and inducted, absque hoc, that the husband granted the advowson to D. and E. The plaintiff traversed the inquisition. It was holden by the Court in this case, that inasmuch as 2 titles are comprised in the bar for the king, viz. the dying seised within age, and the tenure by knight's service, whereby the wardship is vested in the king, and a title to present without office; therefore in the replication they both ought to be answered, and it was not sufficient to traverse the inquisition, but the plaintiff ought to have answered to the tenure, and to the descent alleged of the manor, if the defendant had relied upon them; but because the defendant did not rely upon them, but made them inducements to the traverse of the grant, which is the plaintiff's title, that title ought to be maintained, and not to traverse the inducements to that traverse; and therefore adjudged for the defendant. Cro. C. 104. pl. 6. Hill. 3 Car. in C. B. The Lady Chichesley v. Thompson and the Bishop of Ely.

(M) Of the Place. Necessary. In what Cases.

So in tres-
pass; per
Fitzjohn;
quare inde;
for it seems
to be local.
Br. Ibid.

1. **A** PPEAL of *mayhem* in the ward de Cheap; the defendant said that the said day and year the plaintiff assaulted him in Cornhill ward, and the ill which he had was de son assault domesne, and in defence of the defendant; and a good plea without traversing the *mayhem* in the other ward, by award; for the trespass is the effect, and not the place. Br. Traverse, per, &c. pl. 173. cites 41 Aff. 21.

2. In

2. In dower it was said, that in *precipe quod reddat in D.* it is no plea that the land is in S. if he does not traverse absque hoc that it is in D. for it is alleged in the writ, and that which is contrary to the writ ought to be traversed. Br. Traverse, per, &c. pl. 124. cites 9 E. 4. 16.

3. Replevin of taking in *White-acre in D.* Pigot said that *White-acre is in S.* and made avowry for damage-tenant to have return. Per Cur. you shall say absque hoc that *W. is in D.* and so he did; quod nota. Br. Traverse, per, &c. pl. 308. cites 20 E. 4. 2.

4. In debt upon a bond made at B. it is a good plea that it was made at S. without saying absque hoc that it was made at B. Br. Traverse, per, &c. pl. 279. cites 22 E. 4. 39.

And in action upon retainer in one county, the defendant

may say that he was retained in another county, without traversing the first county. Br. Traverse, per, &c. pl. 279. cites 22 E. 4. 39.

5. There is a diversity between *trespass* and *replevin*; for in replevin the place is traversable; for where he declares in one place, and the defendant avows in another place, there he ought to traverse the taking in the place in the declaration. Contrary in trespass; per Brian and Starkey. Br. Trespass, pl. 369. cites 22 E. 4. 50.

6. In replevin of goods taken in the parish of St. M. the defendant avowed the taking in the parish of St. P. and therefore was held ill, because he ought to have traversed the taking in the place alleged in the count. 2 Lutw. 1147. Mich. 2 Jac. 2. Petree v. Duke.

(N) Of the Place. Good; in what Cases.

1. In debt, the plaintiff counted that the defendant retained him at B. in the county of K. to serve him in the war in France, where B. was in France, and yet good; for the place is not traversable. Br. Count, pl. 94. cites 48 E. 3. 2, 3.

2. In debt upon a duty due by the king, assigned to him by tally delivered, he counted, that he such a day, place, and county, shewed to the customer the tally, at which time he had enough to pay, and would not. To which the defendant said, that such a day in April he shewed to him the tally, at which time he had nothing, nor ever after; absque hoc, that he shewed the tally before this day, and well. Br. Traverse, per, &c. pl. 18. cites 27 H. 6. 9.

But contra, where he justifies in another county, and traverses the first county; for the first county is parcel of the issue.

Therefore there the place and county shall be shewn in the bar in this case; but in the other case he need not to shew the place nor county in the bar, and then it shall be intended to be where the plaintiff has counted by his count; per Cur. quod miror. Br. Traverse, per, &c. pl. 18. cites 27 H. 6. 9. — S. P. Heath's Max. 108. cap. 5. cites 27 H. 6. 1. 43 E. 3. 29. 7 H. 6. 35. 9 H. 6. 50. 71. 21 H. 6. 8, 9.

3. Nuisance, that he levied a mill in D. in the county of K. to the nuisance of his frank-tenement in the same vill. The defendant said, that he and all his ancestors, &c. have been seised of a mill in D. in the county of E. and the mill fell by tempest, and he re-edified it, as lawfully he might; absque hoc, that he is guilty of any nuisance in

* [352] Contra of battery, or goods carried away, which may be continued, and are trans-

rory, there
he shall tra-
verse all the
county. Br.
Ibid.——

D. in the county of K. and did not traverse all the county. And yet well, per tot. Cur. because the thing is local, and annexed to the frank-tenement. Br. Traverse per, &c. pl. 252. cites 18 E. 4. 1.

And accordingly in trespass for damage feasant; the same year, fol. 11. *ibid.*

Heath's
Max. 109.
cap. 5. cites
S. C. and
says, that
always in
replevin the
place of the
taking is
traversable.

4. In replevin of taking at *W.* in the county of *O.* in a place called *P.* the plaintiff said, that the taking was in *P.* in the vill of *O.* Absque hoc, that he took them in *W.* Keeble said, the traverse is not good; for it extends to the vill, and not to the place. But by the opinion of the Court, the traverse is as well to the vill as to the place; but a man cannot plead misnomer of the place, but he may well traverse the place. Br. Traverse, per, &c. pl. 386. cites 16 H. 7. 7.

Heath's
Max. 108.
cap. 5. cites
S. C.

5. Action for making false cloths in Bartholomew-fair against the statute. The other said, that he made them well and truly at *D.* in the county of *F.* Absque hoc, that he made them in Bartholomew-fair in *L.* prout, &c. and a good plea. Br. Traverse, per, &c. pl. 368. cites 34 H. 8.

4 Le. 4. pl.
14. and 106.
pl. 17. S. C.
accordingly,
and in much
the same
words.

6. Trover, &c. for goods in Ipswich. The defendant pleaded, that the goods came to his hands at Dunwich in the same county; and that the plaintiff gave him the goods, which came to his hands at Dunwich; absque hoc, that he was guilty of any trover, &c. at Ipswich. And by the opinion of the Court the pleading is good, by reason of the special justification. But where the justification is general, the county is not traversable at this day. Godb. 137. pl. 163. Mich. 27 & 28 Eliz. B. R. Strangden v. Barnell.

7. If a man justifies in a place in Suffolk, absque hoc, that he is guilty out of the county of Suffolk, this is not a good traverse. Roll's Rep. 265. pl. 37. Mich. 13 Jac. B. R. in case of EVELEY v. SLOLEY, it was said by Hele to have been adjudged in the Exchequer the same term, between Taylor and Downe.

As in tro-
ver, &c. of
so many
hogheads of
cyder in
London, the
defendant

8. When a justification is local, as where a man justifies by warrant of a justice of peace, or such particular matter, the place where, &c. may be traversed; but where the matter is transitory, and not local, it is otherwise. 3 Bulst. 209. Trin. 14 Jac. Phillips v. Weeks.

pleads bailment of them unto him, to re-deliver to another in the county of Oxon, to spend in his house; the which accordingly he had done, and takes a traverse, absque hoc, that he converted the same at London, aut alibi extra com. Oxon. Upon this plea the plaintiff demurred in law. Dodderidge J. said, the plea here, in effect, is no more than non culp. the general issue, and so not good. The Court agreed with him herein; and therefore, by the rule of the Court, judgment was given for the plaintiff. 3 Bulst. 209. Phillips v. Weeks.——S. C. Roll. Rep. 395. pl. 19. accordingly.——And *ibid.* 396. pl. 20. in case of BUSH v. LUXBURROUGH, S. P. adjudged.

So where an action against a carrier was brought in London for goods delivered in Yorkshire, to re-deliver at London, the defendant pleaded a robbery at Lincoln, absque hoc, that he lost them at London. The Court held the traverse ill, because the justification was not local; though Scroggs J. was of a contrary opinion. And judgment was given for the plaintiff. 2 Mod. 270. Mich. 29 Car. 2. C. B. Barker v. Warren.

(O) *Things doubtful to the Jurors.*

1. **W**HERE *prescription of villeinage* is alleged in the plaintiff, and in his blood, the plaintiff may say, that his father was a bastard; and a good plea without traverse, because the matter is doubtful to the jurors; and yet both are in the affirmative. Br. Traverse, per, &c. pl. 185. cites 5 H. 7. 11, 12.

2. And in *ravishment of ward*, if the defendant says that he holds in socage, and not in chivalry, and he as *prochein amy* took the infant, this is not a good plea; for the jurors do not know what is socage, nor what is service in chivalry; and therefore he shall say, that he holds by fealty and such rent, or the like, &c. which is socage, and traverse the chivalry; quod nota. Br. Traverse, per, &c. pl. 185. cites 5 H. 7. 11, 12.

(P) *Traversable. What other Things, in general.*

1. **N**OTE, that it was put in issue in *trespass* brought by the master of Saint L. if he was master, or the plaintiff; quod nota, that this traversable. Br. Traverse, per, &c. pl. 39. cites 43 E. 3. 29.

2. These words in a writ, *master, most reverend, nephew, doctor*, or the like, are not traversable. Contrary of *knight, taylor, carpenter*, &c. Br. Traverse, per, &c. pl. 32. cites 35 H. 6. 55.

3. That which is alleged in *protestation*, and not by matter in fact, is not traversable. Br. Traverse, per, &c. pl. 162. cites 39 H. 6. 5.

4. *Matters in fact* ought to be confessed, and avoided by traverse. Br. Brief, pl. 339. cites 1 E. 4. 9.

Traverse shall be only to matter of

fact. Pl. C. 231. Willion v. Barkley. — Every matter in fact alleged by the plaintiff may be traversed by the defendant; per tot. Cur. Yelv. 195. Mich. 8 Jac. B. R. in case of Tatem and Poulter v. Perient.

5. The *distress* in the *ne injuste vexes* is not traversable. Br. Petition, pl. 26. cites 5 E. 4. 118.

6. *Arresting of a man for suspicion* is good cause, and the *suspicion* is traversable; quod nota; and it seems to be law. Br. Peremptory, pl. 39. cites 4 H. 7. 2.

Br. Trespas, pl. 268. cites S. C.

7. Every thing which is material is traversable. Br. Traverse, per, &c. pl. 238.

The traverse must always be of

the material matter of the plea only. This was laid down as a rule. Arg. Lat. 12. in case of Constable v. Clobery, and cites 15 E. 4. 2. 19 H. 8. 7. 32 H. 6. 16. 2 H. 5. 2. 3 H. 6. 33. 7 Rep. Ughtred's case. — Noy, 75. S. C.

8. *Surmises* never shall be traversed. Pl. C. 76. a. Arg. in case of Wimbish v. Ld. Willoughby.

As if writ comes to receive a feme

in the reversion, upon default of the tenant for life, by attorney, because she is grossly enscent, this surmise is not traversable though it be false. Quod fuit concessum. Pl. C. 76. a. — So the surmise of damages in a curia claudenda is not traversable. Br. Petition, pl. 26. cites 5 E. 4. 119. — So of a recital that the defendant has made an attorney, because he is sick, the being sick is not traversable, &c. F. N. B. 25. (D). — But where suggestions are in case of the spiritual court or admiralty, they are traversable. L. P. R. tit. Suggestion. — * See pl. 29.

Traverse, per,
& pl. 10.
cites 28 H.
6. 7.

9. *Sciens*, as the knowing of a deed to be forged, or of a dog being accustomed to bite sheep, is not traversable, but must be proved in * evidence upon the general issue; for *sciens*, &c. is not a direct allegation. 4 Rep. 18. b. pl. 14. 32 & 33 Eliz. Gerard v. Dickenson.

10. *Condition precedent* is traversable. Noy, 75. in case of Constable v. Cloberry, cites 48 E. 3. 34. 9 E. 4. 3. b. 3 H. 6. 33.

S. P. Pl. C.
231. a. per
Cur. 4 Eliz.
in case of Willion v. Berkley.

11. *Matter in law* shall never be traversed; per Cur. Yelv. 200. Hill. 8 Jac. B. R. in case of Kenicot v. Bogan.

12. The *point of the suggestion in a prohibition*, is always traversable.

13. *As in a prohibition* against churchwardens, the plaintiff declared that his lands were charged with the payment of 15ths and 5s. yearly to the poor, and that the surplus of the profits were for his own use, the defendant maintained his libel, and averred that the surplus of the profits were to go to repair the church, and the residue to charitable uses *absque hoc*, that the surplus, &c. was for the use of the plaintiff; and upon demurrer it was objected that the traverse was ill, because that which was traversed was only an inducement to the plea, and inducements must not be traversed. Fleming and Williams agreed that the traverse was good because it is the sole negative and the point of the libel, and no other issue could be taken; and per tot. Cur. judgment against the plaintiff. 2 Bulst. 20. Mich. 10 Jac. Austin v. Clifton.

14. An *averment* is in any [some] case traversable and issuable; for [as] if an executor pleads that he has no goods, nor ever had, whereas he should have pleaded *plene administravit*, and so nothing in his hands; per Doderidge J. and Mann the secondary affirmed it with other cases. Brownl. 225. Pasch. 11 Jac. in case of Miles v. Jones.

15. *Circumstances* are not traversable.

16. *As*, where it was made to the date of a bond, it was not material; for a deed bearing an impossible date is good enough; per Crew Ch. J. Lat. 61. Pasch. 1 Car. in case of the Bishop of Norwich v. Cornwallis.

Noy, 75.
S. C. accordingly;
for the voyage is the
substance of the
covenant, and
not the going with the
next wind,
which is uncertain every hour.——S. C. Palm. 397. held accordingly.——Lat. 12. and 49. S. C.
and the traverse held ill.——S. C. cited Arg. Hard. 69. in case of the Protector v. Holt.

17. So where in *covenant* the plaintiff declared on indenture of covenant, that a ship should sail with the next fair wind; and that the merchant should pay so much for freight, the defendant traversed *absque hoc*, that the ship did sail with the next fair wind. And upon demurrer Crew Ch. J. Doderidge and Jones J. held the traverse ill; for Crew said a circumstance cannot be traversed, and wind is alterable. Poph. 161. Pasch. 2 Car. B. R. Constable v. Cloberry.

18. But when the party will allege the circumstances and need not, there this is traversable; quod nota. Br. Traverse, per, &c. pl. 179. cites 4 H. 7. 9.

19. A *false return* to a writ of restitution is not traversable; but the plaintiff is put to his action on the case. Per Doderidge J. Lat. 124. Pasch. 2 Car. in Audley's case.

The Court denied a Sheriff's return to be traversable,

as in cases of *devastavit* returned upon a *fieri facias*, the party cannot traverse, but is put to his action on the case, which is the way the law allows to remedy the party upon a false return. Skin. 76. Mich. 34 Car. 2. B. R. in the Lord Grey's case.

20. A man shall never traverse a *matter alleged out of time*; agreed per Cur. 2 Salk. 628. pl. 2. Mich. 10 W. 3. B. R. Pullen v. Benson.

Ld. Raym. Rep. 156. S. C. & S. P. As where in debt on bond

the plaintiff expressly avers that the defendant was of full age when he delivered the bond, yet the defendant may plead infancy and shall not traverse that he was of full age, and that for this reason, because it was alleged out of time. Per Holt Ch. J.

21. *Matter immaterially alleged* is not traversable; agreed per [355] Cur. 2 Salk. 628. pl. 2. Mich. 10 W. 3. B. R. in case of Pullen v. Benson.

22. A *record* may be pleaded by way of *inducement*, which is not traversable, and thereto nul tiel record is no plea. So if record of an inferior court be pleaded, it is not traversable, because not a good plea; per Holt. 12 Mod. 351. Pasch. 12 W. 3. B. R. in case of Creamer v. Wickett.

See pl. 28.

23. There is a diversity between a fine and an amercement; if a *fine* be imposed it is not traversable, but *amercement* is. 12 Mod. 391. Pasch. 12 W. 3. B. R. in case of Dr. Grenville v. College of Physicians.

24. Where H. acts as a judge, his act is not traversable; otherwise of a constable or officer committing for the peace. 1 Salk. 397. Trin. 12 W. 3. B. R. Groenvelt v. Burwell.

25. *Fraud* is traversable. See 12 Mod. 528. Trin. 13 W. 3. B. R. Parker v. Atfield.—See Lat. 111. Beaumont's case.

The keeping judgments on

foot by fraud must be traversed, and whether they are paid or not, is but evidence. Keb. 762. pl. 72. Trin. 16 Car. 2. Woodley v. Haydon.

26. A man's being the king's creditor in a *quo minus* is traversable, if the party comes in due time to do it; per Holt Ch. J. 12 Mod. 535. Trin. 13 W. 3. B. R. Wilbraham v. Lownds.

27. *Whatever is necessarily understood, intended, and implied* in a plea, may as well be traversed as what is expressed. 2 Salk. 629. pl. 6. Pasch. 3 Ann. in case of Gilbert v. Parker.

6 Mod. 128. S. C. and S. P. S. P. and cited

10 Mod. 302. in case of Muston v. Yates.

28. *Matters of record* are not traversable. 2 Salk. 521. pl. 22. Pasch. 4 Ann. B. R. Fanshaw v. Morrison.

2 Ld. R. Rec. S. C. &

—As in debt, the plaintiff declared on a judgment obtained 1st May, &c. before the mayor and bailiffs of Norwich, at a court then held there according to the custom, &c. the defendant pleaded that the court there held according to the custom, is held before the mayor; and traversed that the plaintiff obtained a judgment at the court held 1st May before the mayor and bailiffs. and upon a demurrer objected that the plea was ill, because the defendant had traversed matter of record, which is to be tried by a jury; and this was adjudged ill upon a demurrer, but it had been otherwise after a demurrer. Lev. 193. Mich. 18 Car. 2. B. R. Duing v. Respais.

29. *What is set forth only by way of recital*, may be traversed; for the pleas of *non assumpsit* and *non est factum* are both of them

pleas which traverse matters in those respective actions that are pleaded by way of recital; per Parker Ch. J. 10 Mod. 191. Mich. 12 Ann. B. R. Sestern v. Cibber.

(Q) *In what Cases. Abatement, Entry, or Gift in Tail.*

1. **I**N assise, the tenant pleaded bar that his father was seised in fee, and by protestation died seised, and he entered as heir, and gave colour; and the plaintiff said that J. N. was seised in fee, and infeoffed him, by which he was seised till by the defendant disseised; to which the tenant said that his father was seised, and by protestation died seised, and after J. N. abated and infeoffed the plaintiff, upon whom the tenant as son and heir entered, and was seised, till by the plaintiff disseised, upon whom D. entered, upon whom the tenant re-entered; and the plaintiff said that the father of the tenant infeoffed the said J. N. who infeoffed the plaintiff as above, &c. absque hoc that J. N. entered after the death of the father of the tenant; and the tenant said that he entered as above, &c. and so to issue, and found for the plaintiff. And per Fortescu, the issue is jeofail; for the traverse is to no purpose, the reason seems to be inasmuch as he ought to have traversed the abatement, and not the entry; quære for adjournatur. Br. Repleader, pl. 25. cites 37 H. 6. 5.

Br. Pleadings, pl. 56. cites S. C.—
Heath's Max. 113. cap. 5. cites S. C.

2. Entry; the tenant intituled himself by gift in tail made by T. to his ancestor, &c. the demandant made title, because W. was seised and gave in tail to the father and mother of the demandant; the father died, the mother survived him, and died seised, and the said T. abated and gave in tail to the ancestor of the tenant upon whom the demandant re-entered, there, per Prisot clearly, the tenant may maintain his bar, and traverse the abatement, and shall not be compelled to traverse the gift in tail to the ancestor of the demandant. Br. Traverse, per, &c. pl. 159. cites 38 H. 6. 18.

(R) *Abatement, or dying seised, &c.*

1. **I**N trespass the abatement is not material, nor to the purpose; but where he who pleads it intitles himself by him who died seised, there it is material and answerable for the most part, and otherwise not; per Cur. Br. Traverse, per, &c. pl. 163. cites 39 H. 6. 26, 27.

But otherwise it is in assise of mortdancestor, ayel, cosinage, and tunc like, when he shewes dying seised in writ and declarac-

2. *Trespass* upon 5 R. 2. the defendant pleaded seoffment of J. N. and gave colour to the plaintiff; and the plaintiff said that L. was seised, and died seised, and after J. N. abated and infeoffed the defendant, and [that] one H. as cousin and heir of L. and shewed how, entered and infeoffed the plaintiff, who was seised quousque, &c. Catesby said, before that L. any thing had, S. was seised, and infeoffed L. and J. and after L. died, and J. survived, and was sole seised, and infeoffed the defendant as above, absque hoc that J. abated; and the tra-

traverse of the *abatement* was not held good; for it is confessed and avoided, by which the party relinquished the traverse, and held him to the rest; but per Markham, Yelverton, and all of the Common Pleas, he ought to traverse the *sole dying seised of L.* for it shall be intended that L. died sole seised by all such pleadings as above. Br. Traverse, per, &c. pl. 205. cites 1 E. 4. 9.

tion; for there it is sufficient to allege joint tenancy and survivor without traversing the dying seised;

per Markham Ch. J. the cause seems to be, because writ is only supposal, and so the count or declaration ought to be according to it; but where it is alleged in a plea in bar, title, replication, or other pleading, there it ought to be traversed; note the diversity; by which he traversed the sole dying seised; quod nota. Br. Traverse, per, &c. pl. 205. cites 1 E. 4. 9.

3. Entry in nature of assise, the tenant said that E. was seised in fee, and infeoffed him, and gave colour to the plaintiff; the plaintiff said that before E. any thing had, T. was seised in fee, and gave to J. and K. his feme in tail, who died seised, and had issue C. and the said E. abated and infeoffed the tenant, and the issue entered and infeoffed the demandant, who was seised till by the tenant disseised; the tenant maintained his bar that E. was seised, &c. and infeoffed the tenant, absque hoc that E. abated after the death of J. and K. prout, &c. and the rejoinder was challenged, because he ought to answer to the former possession. And by the opinion of the Court the plea is good; for the demandant avoided the feoffment made to the tenant by the abatement, and so the abatement is traversable well enough. Quod. nota. Br. Traverse, per, &c. pl. 202. cites 5 E. 4. 137.

Heath's Max. 113. cap. 5. cites S. C.

4. In trespass, the defendant said that D. was seised in fee, and infeoffed E. and the defendant as servant of E. did the trespass, and gave colour to the plaintiff. Catesby replied, that a long time before D. any thing had, J. H. was seised, and had issue two daughters A. and K. femes of the plaintiffs. and died seised, and D. abated and infeoffed the said E. and the plaintiffs in right of their wives entered, and were seised till the trespass. Jenney said, a long time after the death of the said J. H. W. D. was seised, and died seised. and D. entered as son and heir of W. D. and infeoffed E. as above. Per Littleton, this is no plea; for it may stand with [the allegation] that W. D. died seised after the death of J. H. and yet D. shall not have thereof advantage; for if D. abated after the death of J. H. and infeoffed W. his father, and W. died seised and D. entered, the entry of the parties is lawful, because D. the abator infeoffed his father, of which descent to himself he shall not take advantage. And tot. Cur. accordingly, by which Jenney said that after the death of J. H. W. father of D. died seised, &c. as above, absque hoc that D. abated after the death of J. H. and before the death of W. his father. Catesby said these words, before the death of his father, is more than is alleged, therefore you ought to traverse the abatement generally; and yet by the opinion of the Court the traverse of Jenney is good, by which Catesby maintained his replication as above, absque hoc that W. D. died seised of the same land. And this was held a good plea per tot. Cur. quod nota, one fans ceo taken upon another fans ceo. Br. Traverse, per, &c. pl. 109. cites 15 E. 4. 22.

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Br. Titles,
pl. 40. cites
S. C.—
Heath's
Max. 113.
cites S. C.

5. In trespass the defendant pleaded *scoffment* of one A. and gave colour to the plaintiff; and the plaintiff said that before A. any thing bad, his father was seised, and died seised, and A. abated and infeoffed the defendant, and the plaintiff entered and was seised, and the defendant did the trespass. And by all the justices, the defendant may maintain his bar, and traverse the abatement, on the dying seised at his pleasure; for it is the title of the plaintiff, and if the one point or the other be false, the title is not good. Br. Traverse, per, &c. pl. 251. cites 18 E. 4. 1. & 26.

Heath's
Max. 113.
cap. 5. cites
S. C.

6. In trespass upon the 8 H. 6. the defendant said that J. N. was seised in fee, and leased to the defendant for one year, and gave colour to the plaintiff; and the plaintiff replied that A. was seised in fee, and gave to the ancestor of the plaintiff in tail who died seised; and the said J. N. abated and made the lease as in the bar; and the plaintiff entered and was seised till disseised by the defendant, who did the trespass; and the defendant maintained his bar *absque hoc* that J. N. abated. And by the reporter, this is no good issue; for the gift and the dying seised is not denied, which tolls entry. But *contra* upon dying seised for life and intrusion, there the intrusion may be traversed; for the dying seised for life does not toll entry, and in intrusion the intrusion is traversable. Br. Traverse, per, &c. pl. 178. cites 3 H. 7. 7.

7. In trespass *ubi ingressus non datur per legem*, the defendant said, that J. S. was seised in fee, and leased to the defendant for life, and gave colour to the plaintiff. And the plaintiff shewed descent to him, and that J. S. abated and leased, upon whom he entered, and was seised till the trespass. The defendant said, that the father of J. S. after the death of the ancestor of the plaintiff, was seised, and died seised; and the said J. S. entered and made the lease, and did not traverse the abatement; and good per tot. Cur. except Davers, without traverse; for traverse will waive the matter in law; that is to say, if J. S. abated, and infeoffed his father who died seised, and J. S. is heir to him, if he shall be in by descent, or only as abator, because he is party to the tort. Br. Traverse, per, &c. pl. 184. cites 5 H. 7. 6.

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See (C).

(S) Of the Conveyance.

1. **T**HE mesne conveyance may be traversed, as *ne lessa pas in writ of entry in consimili casu*, viz. that he who is supposed to lease to the tenant for life, did not lease to him prout, &c. Br. Traverse, per, &c. pl. 343. cites 7 E. 3. 54. and Fitzh. Brief, 947.

Heath's
Max. 121.
cap. 5. cites
S. C.

2. In *quare impedit* by the king, who made title by the heir in his ward because J. S. was seised of 4 acres of land in D. with the advowson appendant and presented, and it descended to the heir as son of N. son of W. son of M. son of the said J. S. There it is no plea, that no such W. in *rerum natura*; for W. is in the mesne conveyance, which is not traversable. Br. Traverse, per, &c. pl. 353. cites 43 E. 3. 7.

3. Trespass

3. Trespas of beating his servant, the defendant said, that it was his servant, and not the servant of the plaintiff; and the others e contra. And so see the mesne conveyance traversed here, and yet it amounts to not guilty; quod nota. Br. Trespas, pl. 13. cites 3 H. 6. 54.

4. Debt for salary by one, who was retained in husbandry, the defendant said that he did not retain him in husbandry; and a good plea, to traverse the contract, or the mesne conveyance, where he cannot wage his law; quod nota, per Cur. and here he cannot wage his law. Br. Traverse, per, &c. pl. 160. cites 38 H. 6. 22. The defendant in debt, &c. shall not be permitted to traverse the mesne conveyance
where he may wage his law, unless in special cases. Br. Ley Gager, pl. 94. cites 21 E. 4. 55.

5. Where a man may wage his law, he shall not be suffered to traverse the mesne conveyance. Br. Pleadings, pl. 119. cites 2 E. 4. 13. S. P. Br. Issues joined, pl. 40. cites 13 E. 4. 4. — But in every action, where wager of law lies not, the conveyance to the action being a thing material, is traversable; per Gawdy J. Cro. E. 201. pl. 27. Mich. 32 & 33 Eliz. B. R. in case of Smith v. Hitchcock.

6. When the defendant intitles himself by a gift, or the like, it shall not be intended, that he has other title than he himself claims, and so it is sufficient to traverse it. Br. Traverse, per, &c. pl. 200. cites 5 E. 4. 133. As where a man pleads seoffment by deed, it is sufficient to say that nothing passed by the deed; and yet it may be that he was infeoffed without deed; but the Court shall not intend his title to be other than he himself shews. Quod nota. Br. Ibid.

7. In replevin the defendant challenged J. S. because he was cousin to a nun of the house, who avowed and shewed how he was cousin; and it was said, that the conveyance is not traversable, but if he was cousin or not. Br. Traverse, per, &c. pl. 344. cites 7 E. 4. 4, 5. So in appeal by a feme of the death of her husband, the defendant pleaded not guilty. The plaintiff prayed process to the coroners, because he is cousin to the feme of the sheriff. And per Yeiverton, in this action the party shall not have traverse to the conveyance of the coignage, but to the coignage itself, if she be cousin or not by any way; for this is not like to action uncestrell, where he makes himself cousin and heir, &c. Quere. Br. Traverse, per, &c. pl. 123. cites 9 E. 4. 6. — Heath's Max. 121. cap. 5. cites S. C.

8. So where a juror is challenged because he holds two acres of the party, it shall not be traversed how he holds of him, but if he holds of him or not. Br. Traverse, per, &c. pl. 344. cites 7 E. 4. 4, 5. So it is of a gossip; it is no matter if he was godfather to a son, or to a daughter, nor to what daughter. Br. Traverse, per, &c. pl. 344. cites 7 E. 4. 4, 5.

9. Where a release and several mesne conveyances are alleged against the plaintiff, or him by whom he claims, the release shall be traversed, * and not the mesne conveyance; for the defendant has possession, and therefore the plaintiff ought to make good title, because he demands the possession. Br. Traverse, per, &c. pl. 116. cites 15 H. 7. 2, 3. * [359] Br. Repleader, pl. 24. cites S. C.

10. But, per Finenx & Keble, where several conveyances are alleged in one title, or in one replication which are on the part of the plaintiff, there the defendant may traverse which of them he pleases, and may traverse any of the mesne conveyances. Br. Traverse, per, &c. pl. 116. cites 15 H. 7. 2, 3. Br. Repleader, pl. 24. cites S. C. — Heath's Max. 119. cap. 5. cites S. C. — Br. Double Plea, pl. 143. cites S. C. — Contra where it is in a bar, and so see a difference between bar and title or replication; and no difference is taken there as to those pleadings, be

they in assise or in trespass. *Quod nota.* Br. Traverse, per, &c. pl. 116. cites 15 H. 7. 2, 3. — Br. Repleader, pl. 24. cites S. C. — Dr. Double Plea, pl. 143. cites S. C.

11. The defendant may traverse *any part of the plaintiff's conveyance* of his action, and not be forced to the general issue. Brown's Anal. 10.

12. Where the *conveyance to the action* is that which doth entitle the plaintiff to the action, it may well be traversed, if the defendant cannot wage his law; otherwise where he may wage his law. Per Gawdy J. Cro. E. 169. Mich. 32 Eliz. B. R. in case of Kinnerfly v. Cooper. — Cites 8 H. 6. 5. 22 Ed. 4. 29. 7 Ed. 3. 54. 31 H. 6. 10. 26 H. 8. Br. Traverse, 5 H. 7. 3.

13. When both parties claim by one and the same person, there always the mesne conveyance is traversable. Cro. E. 798. pl. 46. Mich. 42 Eliz. C. B. in case of Fawkner v. Powel.

14. In trespass vi & armis for *cancelling a deed*, and set forth, that J. S. the defendant being seised of land in fee, *infeoffed A. and his heirs with warranty, reserving rent with clause of distress; and afterwards by deed bargained and sold the rent to the plaintiff, who casually lost the said deed, and the defendant found and cancelled it; but did not expressly shew that he was*, at any time before the action brought, *possessed of this deed*, but only by implication argumentatively. The defendant traversed the bargain and sale of the rent. It was insisted for the plaintiff, that this is only matter of conveyance to his action, and so not traversable. But it was answered, that the plaintiff by shewing his title gives the defendant advantage to traverse it. And per tot. Cur. clearly the grant is not traversable in this case; and so the traverse is not good. Bulst. 214. Trin. 10 Jac. Suckfield v. Constable.

(T) Descent, or Gift in Tail.

1. **I**N *formedon* the gift only is traversable, and not the descents. Br. Double Plea, pl. 16. cites 33 H. 6. 32.

2. If a man conveys to himself *descent of estate tail*, it is sufficient to traverse the gift, without answering to the descent; *quod fuit concessum.* Br. Traverse, per, &c. pl. 210. cites 2 E. 4. 15.

As in trespass the defendant said that his franktene-

ment, the plaintiff said that before that the defendant anything had W. was seised in fee, and leased to S. for term of life, the remainder to the father of the plaintiff in tail, and after S. surrendered, &c. by which, &c. seised in tail, &c. and died seised, and the land descended to the plaintiff as son and heir, and he entered, and was seised in tail, and after leased to N. at will, who infeoffed the defendant for life, and the plaintiff entered; the defendant said that before W. leased for life, the remainder over, he infeoffed L. in fee, and contrary to his own ffoffment ousted him, and made the said lease; and after the said L. before the surrender, and in the life of the father ousted the tenant for life, and infeoffed us, by which, &c. And a good plea per Cur. by which the other said that L. ousted S. tenant for term of life [in the life] of the father in the manor, &c. and the others e contra. Br. Confess and Avoid, pl. 42. cites S. C. — Br. Dette, pl. 148. cites S. C. Brooke says, and therefore see that tail and descent is not double.

(U) *Disseisin or Conveyance, as Release, &c.*

1. **W**HERE the *disseisin* is the effect of the bar, it ought to be traversed by the plaintiff; but where it is only colour for the plaintiff to bring his action, there the other matter, which is the effect of the bar, shall be traversed, and not the *disseisin*. Br. *Traverse*, per, &c. pl. 232. cites 10 E. 4. 7. Br. Confess and Avoid, pl. 46. cites S. C.—
As in trespass the defendant said

that he was seised till by B. disseised, which B. was seised till by the plaintiff disseised, upon whom the defendant at the time of the trespass entered; to which the plaintiff said that before the defendant or B. any thing, H. was seised, and leased to the plaintiff for term of life, by which he was seised till by the defendant disseised, and after B. disseised the defendant, and the plaintiff entered, and was seised, till the defendant did the trespass; and it was moved if he ought to traverse the *disseisin*, and the defendant impleaded. Br. Confess and Avoid, pl. 46. cites 10 E. 4. 7, 8.

2 In assise, the tenant said that J. B. was seised and disseised by W. to whom T. B. made a release, and contrary to his own deed disseised W. and infeoffed 5 persons, who infeoffed the plaintiff upon whom W. re-entered, whose estate the tenant has; and the plaintiff for title said that T. B. was seised, and infeoffed the 5 persons who infeoffed the plaintiff who was seised, till by the tenant and the others disseised, absque hoc that T. B. disseised W. And per Prisot and Pole, this is not traversable; for it is only a conveyance; and because the plaintiff claims by the same person by whom the defendant claims, whose title is bound by the release, therefore he shall traverse the release; and so he did at last. Br. *Traverse*, per, &c. pl. 377. cites 30 H. 6. 7.

3. In ejectment the defendant pleaded, that before B. the lessor, of the plaintiff had any thing, &c. A. the father of the lessor of the plaintiff was seised in fee, and let to the defendant for life, and died seised of the reversion, which descended to B. who entered and disseised the defendant, and let to the plaintiff. The plaintiff says that A. was seised in fee, and died seised; and it descended to B. who entered and leased to the plaintiff, &c. and traverses absque hoc, that A. leased to the defendant prout, &c. And it was thereupon demurred, because he traverses the *disseisin*, and not the lease, which is but a conveyance. But after argument it was adjudged for the plaintiff that the traverse was good, and that he might traverse the one or other at his election; for when both parties make their conveyance from one and the same person, there always the mean conveyance is traversable; wherefore it was adjudged accordingly. Cro. Eliz. 798. pl. 46. Mich. 42 Eliz. in C. B. Fawkner v. Powel, cites 4 H. 7. 2.

(W) *Disseisin or Descent.*

1. **D**EBT for rent reserved upon a lease for years; the defendant pleaded that before the plaintiff any thing had in the lands, &c. one J. S. was seised, and died seised, and his heir entered, and the plaintiff entered upon him and disseised him, and made this lease, and before the rent-day the son entered; the plaintiff by protestation said that J. S. war

was not seised, nor died seised, and pro placito that he did not disseise the son. The defendant demurred; the question was, whether descent or disseisin was traversable. And adjudged that the disseisin was. Moor, 539. pl. 708. Pasch. 39 Eliz. Banister v. Lilley.

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2. In trespasss and ejectment; the defendant pleads that the plaintiff did disseise J. S. of the land, and then made a lease of it to him, and that afterwards the land did descend to the plaintiff. The plaintiff replies that he was seised of the lands, and traversed the disseisin supposed to be made to J. S. And to this the defendant demurs, and for cause shews that he ought to have traversed the descent, and not the disseisin. But Roll Ch. J. said, that the traversing of the disseisin makes an end of all, and therefore it is well taken, as being the most material matter, although the descent might have well enough been traversed; and therefore let the plaintiff have judgment nisi. Sty. 344. Mich. 1652. Wood v. Holland.

(X) Disseisin, or dying seised.

Heath's
Max. 115.
cap. 5. cites
S. C.—
S. C. cited
Arg. Hutt.
124. Trin.
9 Car. in
case of Ed-
wards v. Laurence.

1. **I**N trespasss, if the defendant says that his franktenement, and the plaintiff says that his father was seised, and died seised, and he entered and was seised, and disseised by the defendant upon whom he entered, and the trespasss mesne, &c. in this action the disseisin shall be traversed, and not the dying seised. Br. Traverse, per, &c. pl. 359. cites 30 H. 6. 7. and Fitzh. Trespass, 68.

Heath's
Max. 115.
cap. 5. cites
S. C.—

2. *Contra in assise.* Br. Traverse, per, &c. pl. 359. cites 30 H. 6. 7. and Fitzh. Trespass, 68.
S. C.—Hutt. 124. in the case of EDWARDS v. LAURENCE, Arg. cites 33 H. 6. 59. that Wangford put this case; in assise, if the defendant plead that his father was seised, and died seised, and gives colour to the plaintiff, the plaintiff ought to traverse the dying seised, and not the possession of the father, which is the cause of the dying seised.

See (L) pl. 9.

(Y) Dying seised, or Descent.

1. **E**NTRY in nature of assise, the tenant intituled himself by dying seised of R. S. Danby said, after the dying seised of the said R. one J. was seised in fee, and died seised, and the land descended to the plaintiff as cousin and heir, &c. and shewed how cousin, by which he entered, and was seised and disseised. Arderne said R. was seised as above, and died seised, and the land descended to K. who entered, and leased to the said J. for term of life, of which estate he died seised, and K. entered, and died, and the land descended to C. who infeoffed us, absque hoc that J. died seised in fee, & sic ad patriam. Br. Traverse, per, &c. pl. 98. cites 22 H. 6. 23.

2. In trespasss the defendant said that his father was seised in fee, and died seised, and he as heir entered, and gave colour; the plaintiff said that before the father any thing had, he himself was seised in fee,
and

and gave to the father and his feme in tail, and after the father died without issue, and the feme held in, and after she died, absque hoc that the father died seised prout, &c. Per Fairfax, this is not a good plea, by which he said absque hoc that the father died sole seised prout, &c. and so it was accepted; but it seems that he may have traverse absque hoc that the father died seised in fee prout, &c. Quære; for per Fairfax, dying seised in tail tolls the entry, but not as here where he dies without issue of his body; for then there is no descent. Br. Traverse, per, &c. pl. 266. cites 21 E. 4. 65.

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3. Trespas upon the 8 H. 6. the defendant said that T. was seised and died seised, and the land descended to him as son and heir, and he entered, &c. and the plaintiff said that T. was seised, and married K. and had issue the plaintiff, and died seised. and the land descended to the plaintiff, &c. absque hoc that it descended to the defendant, &c. Quære if this be a good issue, &c. Br. Traverse, per, &c. pl. 152. cites 21 H. 7. 31.

Heath's
Max. 112.
cites S. C.

4. Trespas by M the defendant shewed seisin in fee of J. N. who gave in tail to W. N. and conveyed by descent, and gave colour to the plaintiff by the donor; the plaintiff said that T. himself in the conveyance of the tail infeoffed W. who infeoffed the plaintiff, who was seised till the trespass, absque hoc that the land descended to the defendant modo & forma, and did not deny the dying seised of the father of the defendant alleged in the bar: and therefore by the justices the plea is not good; for he cannot traverse the descent but the dying seised; for where the dying seised is not denied, there it shall be intended that the land descended to the heir; quod nota. Br. Traverse, per, &c. pl. 114. cites 14 H. 8. 23, 24.

5. In trespass, the defendant said that F. was seised, and died seised, and he is cousin and heir to him, viz. son of M. sister of F. by which he entered, and gave colour to the plaintiff; and the plaintiff said that F. had a daughter named E. and conveyed to himself by E. and so he was seised till the defendant did the trespass. And a good plea by the opinion of the Court, and by all except Shelley; for the dying seised is the effect of the bar, and therefore if F. had a daughter the bar is confessed and avoided, and so he need not to take traverse absque hoc that the defendant is cousin and heir, and so note the dying seised is traversable, and not the descent. Br. Traverse, per, &c. pl. 1. cites 19 H. 8. 6.

Heath's
Max. 112.
cap. 5. cites
S. C.

6. In assise, the defendant pleaded that J. A. was seised in fee, and died seised, and the land descended to him, and gave colour; and the plaintiff said that before that J. A. any thing had, W. S. was seised in fee, and infeoffed the said J. A. and W. P. in fee, and J. A. died, and W. P. survived, and infeoffed the plaintiff, who was seised till disseised by the defendant, & hoc, &c. and did not traverse the descent; for the dying seised is the effect, and traversable only, and not the descent, and the dying seised here is confessed and avoided by the jointenancy; and the defendant said that J. G. was seised, and infeoffed the said J. A. in fee, who was seised, and died seised, and all as in the bar, absque hoc that the aforesaid J. A. at the time of his death, held jointly with the aforesaid W. P. & hoc, &c.

And

S. C. cited
Win. 13. in
case of Sir
George
Savil v.
Thornton.

And so see the *joint-tenure put in issue*, and not if *W. S. infeoffed them jointly*, or not. Br. Traverse, per, &c. pl. 6. cites 27 H. 8. 22.

7. In trespass the *defendant conveyed by 6 descents in tail*; the *plaintiff confessed the entail*, and conveyed a *feoffment to him by the heir of the donee*, which was a discontinuance, and traversed the *dying seised of the same feoffor*. This was held ill, and that he should have traversed the very last descent; for otherwise it may be intended that one of the *mesne descents* came to the land, and thereof died seised, and so the next heir remitted. And at length, by advice of the Court, the *plaintiff confessed the tail*, and took all the *dyings seised, except the last, by protestation*, and for plea that he which is supposed to be last, &c. infeoffed the ancestor of the plaintiff, from whom it descended to him *absque hoc that the last ancestor of the defendant died seised modo & forma, &c.* and although the feoffment be false, yet the defendant ought to maintain his first saying, and if it be false he will be tricked. D. 107. pl. 25. Mich. 1 & 2 P. & M. Vivion v. St. Aubin.

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8. In *ejectment supposing a demise by the ld. C. the defendant said that before the plaintiff or the ld. C. any thing had, one B. was seised in fee, and infeoffed one Andrews who died seised, and his son leased to him, and that he was possessed till ousted, and that the son was disseised by the said B. who after infeoffed the ld. C. who demised to the plaintiff*, upon whom the defendant re-entered, &c. the plaintiff took a *protestation to the feoffment, the dying seised, the descent and the demise, prout*, and for plea says, that before the *ejectment B. infeoffed the ld. C. who demised to the plaintiff absque hoc quod B. disseised the son*: but it was holden a good traverse to the disseisin, it being the chief substance of the bar; for if B. was disseisor, this destroys the title of the plaintiff who comes to the land under the disseisin, which title of the plaintiff in ejectment must necessarily be answered either by matter in fact or in law, which confesses and avoids the title or traverses it; for a naked colour in ejectment is not sufficient as it is in assise or trespass, &c. which comprehends no title or conveyance in law, writ or count, as this action does in both, so that the disseisin here shall be intended a confession and avoiding of the title, and of necessity it must be traversed; and 9 H. 6. it is a maxim that a disseisin alleged in bar or replication is always traversable; yet it may be the feoffment of B. to Andrews, or the dying seised, are both traversable at the election of the plaintiff, and given to him by the superfluous folly of the defendant, &c. D. 365. b. pl. 34. 366. pl. 35. Mich. 21 & 22 Eliz. Ld. Cromwell's case.

Bendl. 319.
pl. 320. S.C.
accordingly.
— S. C.
cited Arg.
Lc. 310. pl.
429. in case
of Maidwell
v. Andrews;
but says,
that if the

9. The *avowant conveyed a title to himself as next heir of the lord Powis, who died seised in fee without issue, and the land descended to him*; the *plaintiff confessed the dying seised, but conveyed a title to himself by the devise of the ld. Powis absque hoc, that the land descended, &c.* And upon producing a record of the case of ME-RINGS, Pasch. 14 H. 8. it was adjudged according to that case, that the traverse was ill because the title of the avowant was confessed and avoided; and in such case there ought not to be a traverse.

D. 366.

D. 366. a. b. pl. 36, 37. Mich. 21 & 22 Eliz. Vernon's case, alias *Fowler v. Clayton & al.* parties do not claim by one and the

same person, or the dying seised be not confessed or avoided, there the dying seised shall be traversed and not the descent. — Heath's Max. 110. cap. 5. cites S. C. and so is 19 H. 8. 60. But otherwise as it seems, if he had claimed by survivorship, or in coparcenary.

10. In *covenant* the plaintiff set forth, that the testator made a lease for life rendering rent, and devised the reversion to his wife and died; she married the defendant, and the husband and wife sold the reversion to B. G. for life and the rent to the plaintiff, and covenanted that he should quietly enjoy it without any disturbance from any person, claiming under the said B. G. who died seised of the reversion, and the same descended to his heir; and the breach assigned was, for that the heir claimed the rent by reason of the grant of the reversion to his ancestor; the defendant pleaded the grant of the reversion to B. G. *absque hoc*, that it descended to his heir; and upon a general demurrer this was held an ill traverse, because he ought to have traversed that B. G. died seised, &c. for that is the substance, and the descent is only the consequence of the other. 3 Nels. Abr. 343. pl. 1. cites Dyer, 366. 1 Leon. 309. *Maidwell v. Andrews.* Le. 309. pl. 429. Pasch. 33 Eliz. C. B. this case is argued, but I do not observe that the Court said any thing as to this point of the traverse. — D. 366. seems to mean pl. 36. Vernon's case, alias *Fowler v.*

Clayton & al', which see at pl. 9. above.

11. If the eldest brother pleads descent of land to him in borough English, the youngest has no other plea but to traverse the descent; per *Haughton J.* Palm. 372. Trin. 21 Jac. B. R. *Sumner's case.*

12. So of devisee, if he makes a title against the heir he must traverse the descent; per *Doderidge J.* and *Lea Ch. J.* said, that it would be repugnant to say *verum est*, that it descended et pro placito; that the ancestor devised. Palm. 372, 373. Trin. 21 Jac. B. R. in *Sumner's case.*

(Z) Dying seised, or Gift in Tail.

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See (L) pl. 8.

1. *IN assise* where the tenant makes a good bar, and the plaintiff makes title after by gift in tail, and dying seised, there the gift shall be traversed, and not the dying seised; for no dying seised can be * by gift in tail without dying seised. Br. Traverse, per &c. pl. 12. cites 9 H. 6. 22. But where a man pleads *feoffment in fee*, and dying seised, there the dying seised

shall be traversed, and not the gift; for a man may be seised in fee by disseisin without feoffment; *quod nota.* Br. Traverse, per, &c. pl. 12. cites 9 H. 6. 22.

* All the editions are as here, but the Year-Book is thus, (viz.) that he cannot die seised of estate tail, unless there was a gift, &c. 9 H. 6. 22. a. pl. 17.

2. Trespass upon the 8 H. 6. by J. N. against 2 barons and their wives and another; the defendant said, that N. C. grandfather of the wives was seised in fee and died seised, and the land descended to M. as son and heir, who *protestando* died seised, and the land descended to P. as son and heir of M. who died *protestando* seised without issue, and the land descended to the wives as sisters and heirs, and gave colour, and the plaintiff said that before N. C. any thing had, R. was seised in fee, and gave to the said N. C. in tail, who had issue as in the bar, and

and also had issue the plaintiff, and died seised and all as in the bar, and the defendant maintained the bar, *absque hoc*, that the donor gave in tail prout, &c. and by the reporter the replication confesses and avoids the bar without traversing the dying seised; for now it shall be intended that the donee was seised in fee after discontinuance, and died seised; and then this is a remitter: but if it had been alleged that N. C. had been seised in fee, and died by protestation seised, then the seisin in fee shall be traversed; for there is no other thing to be traversed; for there can be no remitter without dying seised in fact; and so note the difference by him. Br. Traverse, per, &c. 177. cites 3 H. 7. 5.

Br. Confess
and Avoid,
pl. 64. cites
S. C.

3. Trespass by T. C. against E. and S. his feme upon the statute of 5 R. 2. who pleaded that N. grandfather of S. the feme of the defendant was seised in fee and died seised, and the land descended to J. C. his son, as son and heir, &c. who entered and was seised, and by protestation died seised, and the land descended to S. feme of the defendant as daughter and heir of the said J. C. by which E. and S. his feme as cousin and heir of the said N. entered and gave colour to the plaintiff; the plaintiff replied, that before N. any thing had, Martin and others were seised in fee, and gave the land to the said N. in tail to the heirs males, and N. died seised of such estate, and had issue the said J. C. and the said T. C. now plaintiff, and after J. C. died without issue male and had issue S. feme of the defendant, and the said T. C. plaintiff, as son and heir male of the said N. entered as brother of J. C. son of the said N. and the defendant maintained his bar, and traversed the gift in tail to the said N. and the issue found for the plaintiff, that they gave, &c. And the best opinion was, that it is *jeofail*, and that the replication is not good, because where the defendant alleges seisin in fee in N. and that he died seised, the plaintiff alleges gift in tail to this same N. and that he died seised of an estate tail, and did not traverse the dying seised in fee; for he cannot die seised in fee and die seised in tail, and it cannot be intended by this pleading that he discontinued and retook in fee and died seised, so that the heir in tail may be remitted; for though he may be remitted, yet N. the grandfather died seised in fee and not in tail, and therefore the heir is not confessed nor avoided in fact nor in law; and by all he ought to be confessed and avoided in fact or in law, or traversed. For a man shall not make title at large in any case unless in assise; per Cur. Br. Traverse, per, &c. pl. 185. cites 5 H. 7. 11, 12.

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(A a) *Dying seised, or Mesne Conveyance.*

Br. N. C.
pl. 408.
cites S. C.
—Heath's
Max. 120.
cap. 5, cites
S. C.

1. [N] assise the tenant made bar by a stranger and gave colour, the plaintiff made title by the same, by whom the defendant made his bar, viz. that J. S. was seised and gave in tail to his father, who infeoffed W. N. who infeoffed the tenant, upon whom A. B. entered and infeoffed the grandfather of the plaintiff, whose heir he is in fee, who died seised, and the land descended to the plaintiff, and so he was in his remitter until by the defendant disseised, and in truth A. B. never

never entered nor never infeoffed the grandfather; and yet it was held clearly, that the tenant in his bar to the title cannot traverse the feoffment of A. B. but ought to traverse the dying seised of the grandfather of the plaintiff which remitted him; for this binds the entry of the tenant, and is the most notable thing in the title; quod nota. Br. Traverse, per, &c. pl. 154. cites 4 E. 6. Cocks v. Green.

2. Scire facias upon a recognizance in Chancery, issued out of the petty-bag against the tenants of Yarway; the sheriff returned scire feci against several, two of whom pleaded in bar, that Yarway and J. S. were jointly infeoffed, and seised in fee, and so seised the said Yarway died absque hoc, that he was sole seised at the time of the recognizance acknowledged. The plaintiff replied, and confessed that Yarway and J. S. were jointly infeoffed, but that they being so seised, did by bargain and sale enrolled, &c. convey a moiety of the lands to the said 2 defendants in fee, and traversed that Yarway died seised modo & forma. Exception was taken to the traverse, because when it was shewn that Yarway and J. S. had made a bargain and sale in fee, this had sufficiently confessed and avoided the dying seised, alleged by the defendants, and then the plaintiff ought not to traverse the dying seised also; for though the conusor had died jointly seised with J. S. yet by the bargain and sale a moiety of the said lands was liable to the execution, notwithstanding they should have a reconveyance, or that they had disseised the purchaser, and afterwards Yarway had died seised, and J. S. had survived; and so the dying seised in this case not material nor traversable; and of this opinion were the Court. 2 Saund. 23, 24. 28. Hill. 21 & 22 Car. 2. Jefferson v. Morton and Dawson and al.

Mod. 29. Jefferson v. Dawson, S. C. but S. P. does not appear. — Lev. 283. S. C. but S. P. does not appear. — Sid. 436. pl. 1. S. C. says, an exception was taken to the traverse in the replication, which could not well be answered, and therefore leave was prayed to amend inasmuch as the money (being an infant's)

might otherwise be lost, and the same was granted nisi causa. — 2 Saund. 28. says, that both parties consented to alter the defendant's plea, and the plaintiff to reply what matter he would, and that so it was done.

(B. a) Feoffment, or Disseisin.

1. ENTRY in nature of assise, the tenant said that J. N. was seised and infeoffed him, and after disseised him and infeoffed the plaintiff, upon whom he re-entered; the demandant said, that J. N. gave it to the plaintiff by fine, before which fine the tenant had nothing of the feoffment of J. N. and no plea without traversing the disseisin or the feoffment, and so only argument; whereupon he pleaded the fine as above, by which he was seised till by the tenant disseised absque hoc, that the * tenant any thing had of the feoffment of J. N. before the fine. Br. Traverse, per, &c. pl. 294. cites 21 H. 6. 12.

Br. Traverse, per, &c. pl. 86. cites S. C. accordingly, and the tenant said that J. N. infeoffed him before the fine, and so to issue.

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2. The feoffment made by disseisor to persons unknown is not traversable, but the disseisin or the pernaney of the profits. Br. Traverse, per, &c. pl. 203. cites 1 E. 4. 1, 2.

As where non tenure is pleaded by N, and the demandant

avers that he was seised and disseised by N. who infeoffed persons unknown, and that he took the profits; there the tenant may traverse the disseisin, or the taking of the profits, but not the feoffment to persons unknown; per Markham and Donby the Ch. Justices; and accordingly often elsewhere. Br. Traverse, per, &c. pl. 335. cites 4 E. 4. 30.

3. Trespas upon the 5 R. 2. by J. N. the defendant said that R. and W. were seised in fee, till by the plaintiff disseised, and the defendant as servant to them by their command entered; the plaintiff said, that T. was seised and disseised by the said R. and W. which R. and W. were disseised by the plaintiff, upon whom T. re-entered and infeoffed the plaintiff, and he was seised till the defendant did the trespass, and the defendant maintained his bar, absque hoc that the plaintiff any thing had of the feoffment of T. after the disseisin made by the plaintiff to the said R. and W. And the best opinion was that he ought not to traverse the feoffment; but maintain what is defeated by the title, for otherwise it shall be a departure from his bar, and so he did gratis after. Br. Traverse, per, &c. pl. 239. cites 1. E. 4. 5.

But if he
had pleaded
that he him-
self was
seised, till by
R. disseised,
who infeffed the plaintiff,

4. In trespass the defendant said, that he himself was seised and leased at will to R. who infeffed the plaintiff, and he entered; the plaintiff shall not traverse the lease at will, but the feoffment. Br. Traverse, per, &c. pl. 218. cites 5 E. 4. 4.

who infeffed the plaintiff, upon whom he entered; now he shall traverse the disseisin; quod nota bene. Br. ibid. — Heath's Max. 115. cap. 5. cites S. C.

5. In trespass of a close broken, the defendant said that R. was seised in fee, and before the trespass infeffed the defendant in fee, and gave colour by R. the plaintiff said, that the said R. was seised, &c. and infeffed B. in fee, upon whom R. contrary to his feoffment entered and disseised B. and so seised by disseisin, he infeffed the defendant as in the bar, upon whom B. re-entered and infeffed the plaintiff who was seised till the trespass, and the defendant rejoined that R. did not disseise B. prout, &c. And it was challenged because the disseisin is not traversable, but the feoffment. Per Needham J. the rejoinder is good; for he may traverse the feoffment or the disseisin at his pleasure: and per Danby Ch. J. he may traverse the disseisin clearly if he will; for this is material in the replication. Br. Traverse, per, &c. pl. 201. cites 5 E. 4. 136.

6. Entry sur disseisin of disseisin done to himself, the tenant pleaded recovery by himself in formedon against N. and the possession of the plaintiff mesne between the gift and the recovery. Young, not confessing the gift, nor that the tenant is heir pro placito, said, that the defendant was seised till by the tenant disseised, who infeffed N. pending this writ, and recovered by formedon pending this writ, and so the recovery false and void in law. And per Danby, clearly in this case he shall not say that he ne infeoffa pas, but shall traverse the disseisin, and not the feoffment. But per Littleton and Choke, he may traverse the feoffment if he will. Br. Traverse, per, &c. pl. 224. cites 7 E. 4. 19.

7. In trespass of a close broken, the defendant said, that the place was his franktenement, &c. The plaintiff said, that J. N. was seised in fee, and leased to the plaintiff at will, and was so possessed till the defendant ousted him, and disseised J. N. and the plaintiff by command of J. N. re-entered, claiming his first estate, and the trespass mesne between the disseisin and the re-entry. And by some he may re-enter without command. And the defendant maintained his bar, absque hoc, that J. N. leased prout, &c. and the issue accepted; for it is necessary to shew who made the lease as of gift in tail, or for life, or

For years, he ought always to shew who was seised, and gave or leased, and so the gift or lease is traversable, for it is material. But in trespass, if the defendant pleads in bar, and the plaintiff intitles himself, that is to say, that J. B. was seised, and infeoffed the plaintiff in fee, who was seised till by the defendant disseised; there he shall traverse the disseisin, and not the feoffment, for the feoffment is only a conveyance there; for he need not to have alleged the feoffment in trespass, and so it is not traversable. *Contrary in assise*; for there he shall make title, and there the feoffment may be traversed. And all the Court agreed this case of trespass, and so it seems, that every thing which is material is traversable. Br. Traverse, per, &c. pl. 238. cites 11 E. 4. 3.

8. In trespass the defendant pleaded his franktenement. The plaintiff said, that A. mother of the defendant, and two others, were seised in fee, and infeoffed the plaintiff, by which he was seised till by the defendant disseised, upon whom the plaintiff re-entered, and the trespass mesne. The defendant said, that B. was seised, and gave to the said D. in tail, by which the land descended to him as son and heir of the donee, by which he entered, &c. *Absque hoc*, that the said A. and the other 2 infeoffed the plaintiff, prout, &c. and the issue found for the plaintiff. And it was pleaded in arrest of judgment, because the feoffment was traversed where the disseisin ought to have been traversed. Per Keble: *where the plaintiff and defendant claim by one and the same person, the feoffment shall be traversed, and otherwise the disseisin shall be traversed, for that which is not traversable at the commencement, may be traversed by matter ex post facto*. And Daverse and Brian Ch. J. accordingly; but Hawes and Townsend, justices, contra. And yet Townsend confessed the ground put by Keeble, and took a difference, because the one claims by A. only, and the other claims by A. and two others. Br. Traverse, per, &c. pl. 179. cites 4 H. 7. 9.

(C. a) Feoffment, or dying seised, &c.

1. **W**HERE a man pleads feoffment in fee, and dying seised, there the dying seised shall be traversed, and not the gift; for a man may be seised in fee by disseisin, without feoffment; quod nota. Br. Traverse, per, &c. pl. 12. cites 9 H. 6. 22.

2. In trespass the defendant said, that W. was seised and leased at will to A. and he, as servant to A. did the trespass, and gave colour. The plaintiff said, that S. was seised, and died seised, and the land descended to him, and he entered, and was seised till the defendant did the trespass. To which the defendant said, that a long time before S. any thing had, J. and P. were seised, and infeoffed W. named in the bar, who leased to the said A. at will, who infeoffed the said S. who died seised, the said W. being within age, by which W. entered for alienation to his disinherittance; and after leased again to A. to hold at will, as in the bar. To which the plaintiff said, that the said S. was seised, and died seised, and the land descended to the plaintiff, who entered, &c. *Absque hoc*, that the said J. and P. infeoffed the said W.

Br. Traverse, per, &c. pl. 26. cites S. C.

in life of the said S. And ill pleading, per Cur. for 2 causes ; one, because he held that J. and P. did not infeoff W. *in the life of S.* whereas it may be, that they infeoffed him before S. was born, and then the issue is found for the plaintiff, and yet he shall be barred ; for it ought to be, absque hoc, that they infeoffed W. *before the death of the said S.* Quod nota. Br. Repleader, pl. 5. cites 33 H. 6. 49.

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Br. Tra-
verse, per,
&c. pl. 26.
cites S. C.

3. *Another cause* is, becaue the defendant intituled himself by feoffment of J. and P. made to W. by lease at will, by W. to A. And the plaintiff intituled himself by S. who is a stranger ; and traversed, that J. and P. did not infeoff S. where he does not claim by J. and P. But contra, if he had claimed by them ; therefore it seems if he had said, that the said J. and P. had infeoffed the said S. who died seised as above, absque hoc, that they had infeoffed W. before the feoffment made to S. then good. But quære, if no feoffment was made by them to S. Br. Repleader, pl. 5. cites 33 H. 6. 49.

4. In mortdancestor, if the tenant pleads matter of fact, as feoffment of the same ancestor, there he ought to traverse the dying seised. Contra where he pleads fine or recovery ; for there the heir shall be estopped to say that he died seised, contrary to the record, without shewing how the ancestor came after to the land in the assise ; quod nota. Br. Mortdancestor, pl. 52. cites 6 E. 4. 11.

5. Trespass upon 5 R. 2. the defendant said, that B. was seised, and infeoffed A. who infeoffed the defendant, and gave colour to the plaintiff. The plaintiff said, that R. was seised before that B. any thing had, and died seised, and the land descended to the plaintiff as heir, and he entered ; absque hoc, that B. infeoffed A. prout, &c. And a good traverse by all the justices ; for if the conveyance be false, the bar is not good ; and if the plaintiff in his replication alleges a feoffment to B. and dying seised, the defendant may traverse the one or the other. Quære, for it was not denied. Br. Traverse, per, &c. pl. 253. cites 18 E. 4. 26.

6. In assise against A. who says, that the plaintiff infeoffed his father in fee, who died seised, and he entered as heir, &c. The plaintiff says, that he brought assise against the father of the said A. and recovered, and had execution. There he ought to traverse the feoffment made to the father of the tenant, and not the dying seised ; and yet at the commencement the feoffment was not traversable. Br. Traverse, per, &c. pl. 179 cites 4 H. 7. 9.

7. Where several feoffments, with a dying seised, are alleged, the dying seised shall be traversed, and not the mesne conveyance. Br. Traverse, per, &c. pl. 116. cites 15 H. 7. 2, 3.

* See Que
Estate.

(D. a) Feoffment, or * Que Estate, &c.

1. IF A. brings assise against B. and B. says, that J. N. recovered against A. que estate B. has, whereas B. is in by disseisin, A. shall say, that after the recovery J. N. infeoffed him, by which A. was seised till by B. disseised ; absque hoc, that B. has J. N.'s estate ;

estate; per Rogers. But, per Markham, contra; for *A.* shall say, that after the recovery he entered and infeoffed *A.* and, contrary to his own feoffment, he entered and infeoffed *B.* the tenant, upon whom *A.* entered and was seised, till by the tenant disseised; and so confess and avoid it, and not traverse the *que estate*, and *B.* can traverse nothing but the feoffment which was made after the recovery; quod Billing concessit. Br. Traverse, per, &c. pl. 226. cites 7 E. 4. 26.

2. In assise, feoffment is pleaded of one *J. N.* to *T.* whose estate the tenant has. The *que estate* is not traversable, unless the plaintiff claim, by the same person, and then the *que estate* is traversable; per Keble. Br. Traverse, per, &c. pl. 179. cites 4 H. 7. 9.

if he claims by the same person the feoffment is traversable. Br. Traverse, per, &c. pl. 179. cites 4 H. 7. 9.

So of a feoffment pleaded in assise, if the plaintiff claims by another; but

3. In replevin the defendant avowed for damage feasant in his freehold. The plaintiff replied, that long before the defendant had any thing therein, he himself was seised of the place where, &c. till by *A. B.* and *C.* disseised; against whom he brought assise, and recovered; and that the estate of the plaintiff was mesne between the assise and the recovery therein. The defendant rejoined, that before the plaintiff had any thing therein, one *G.* was seised, and infeoffed him, absque hoc, that *A. B.* and *C.* or either of them, had any thing therein at the time of the recovery. Walmesley J. held the bar not good, because it did not say that *A. B.* and *C.* were tertendants tempore recuperationis, which should be shewed in every recovery where it is pleaded. But Windham contra, because the assise may be brought against others as well as the tenants, as against disseisors; but other real actions must be against the tertendants only, and therefore need not shew they were tertendants at the time of the recovery; and also the traverse here is well enough. Le. 193. pl. 277. Mich. 31 and 32 Eliz. *C. B. Rigden v. Palmer.* [369]

4. In trespass the defendant pleaded, that *A.* was seised, and infeoffed *B.* who infeoffed *C.* who infeoffed *D.* *que estate* the defendant has. The plaintiff may traverse which of them he will. 6 Rep. 24. a. b. by the reporter in READ'S CASE, cites 15 H. 7. 3. and 16 H. 6. double plea, 83.

5. In trespass the defendant pleaded, that *A.* was seised, and infeoffed the defendant. The plaintiff said, that *J. S.* was seised, and died seised, and the land descended to him, and traversed, absque hoc, that *A.* infeoffed *B.* and adjudged a good traverse. 6 Rep. 24. b. in READ'S CASE, by the reporter, cites 18 E. 4. 26. and says, that so is 21 H. 7. 33. and that this is true in all cases where the defendant does not claim by any of the mesne conveyances from the plaintiff himself, for then it is traversable.

(E. a) *Lease, &c. or Mesne Conveyance.*

Br. Repleader, pl. 24. cites S. C. Heath's Max. 119. cap. 5. cites S. C. — S. C. cited Winch. 13. in case of Sir George Savil v. Thornton.

1. **T**RESPASS by the prior of T. for entering into a house, the defendant said that the predecessor of the plaintiff leased to J. N. for 14 years, who was possessed, and granted it to J. N. who made J. his fame executrix, and died, and A. married J. and after A. and J. granted to T. B. to the use of T. T. and after T. T. granted the rest of the term to the defendant by which he entered, judgment *si actio*; the plaintiff said that he was seised in fee in right of the house till the defendant did the trespass, absque hoc that A. and J. granted, &c. prout, &c, and so traversed the mesne conveyance, and not the lease of his predecessor under the common seal which bound him, and were at issue, and found for the plaintiff, and this matter alleged in arrest of judgment. And per Fineux, Brian, and Wood, justices, it is *jeofail*; for he ought to traverse that which binds him when he makes his bar from the plaintiff, or derives his title by the plaintiff, and binds him. Contra Fisher and Davers; but at the last it was agreed in a manner by all the Court, that it is a *jeofail* for the cause aforesaid. Br. Traverse per, &c. pl. 116. cites 15 H. 7. 2, 3.

Heath's Max. 119. cap. 5. cites S. C. — But he may say that the lessee surrendered to him absque hoc that he granted his estate to the defendant, and so trick him, though it be upon a lie; quod nota. Br. Traverse, per, &c. pl. 4. cites 27 H. 8. 2, 3. — Heath's Max. 121. cites S. C.

2. Note in trespass, if the defendant pleads a lease of the plaintiff made to J. N. who granted the estate to him, the plaintiff cannot traverse the grant of the estate but the lease; for this is the thing which binds him. Br. Traverse, per, &c. pl. 4. cites 27 H. 8. 2, 3.

[370] 3. Replevin; the defendant avowed by reason of a copyhold granted to him by C. bishop of W. lord of the manor; the plaintiff said, that before C. was bishop, H. was bishop, by whose death the temporalities came to the queen, during which the copyhold escheated, and the queen granted it to the plaintiff in fee, and traversed the grant by C. The whole Court held that the traverse was good, and that the grant by the queen of the copyhold escheated, was good, and that this traverse ought to be; for there is not any confessing and avoiding, because he does not confess the seisin and grant by copy; but if he had confessed that C. had entered and granted it by copy, then there need not any traverse; and it was ruled accordingly. Cro, E. 754. pl. 17. Pasch. 42 Eliz. C. B. Covert's case.

(F. a) *Lease or Reversion.*

1. **I**N *præcipe* quod reddat, the tenant made default after default, and one prayed to be received by reversion, because he leased for life to the tenant, &c. there the reversion shall be traversed, and not the lease. Br. Traverse, per, &c. pl. 364. cites 33 H. 6. 38. 2, But

2. But upon aid prayer, the lease shall be traversed, and not the reversion; note the diversity. Br. Traverse, per, &c. pl. 364. cites 33 H. 6. 38.

In Trespass, if the defendant says that J. F. was seised,

and leased to F. for life, and prays aid of him, the plaintiff shall make title, and shall traverse the lease. Br. Traverse, per, &c. pl. 316. cites 5 E. 4. 1.

But if the defendant pleads that it is the franktenement of J. F. who leased to him, &c. and prays aid, the plaintiff shall make title, and shall traverse the franktenement, and not the lease, per Heydon. And Brooke says it is not much to the purpose. Br. Traverse, per, &c. pl. 316. cites 5 E. 4. 1.

3. Where the defendant in trespass of entry into a close says, that J. S. infeoffed him, and gives colour to the plaintiff, and the plaintiff says that R. was seised and leased to S. at will, who infeoffed the defendant, and after R. entered and infeoffed the plaintiff, absque hoc that S. any thing had, unless at will; this is a good traverse, but shall not traverse the lease at will. Br. Traverse, per, &c. pl. 217. cites 5 E. 4. 1.—But in the time of E. 6. he ought to say absque hoc that J. S. was seised in fee modo & forma, prout, &c. Ibid.

Heath's Max. 116. cap. 5. cites S. C.

(G. a) Matter of Record, or Matter in Fact.

1. WHERE matter of record and matter in fact are jointly pleaded together, as in the foreign attachment in London of debt in another's hand, so that the matter of record is not good, but by reason of the matter in fact, there the matter in fact is traversable, notwithstanding the record, as to say that no such custom. Br. Traverse, per, &c. pl. 276. cites 22 E. 4. 30.

2. And where recovery is pleaded by defendant in assise or praeipe quod reddat, the tenant ought to aver that the tenant was tenant of the franktenement at the time of the recovery, and there the demandant shall have answer to it that he was not tenant of the franktenement at the time, &c. Br. Traverse, per, &c. pl. 276. cites 22 E. 4. 30.

3. And in formedon, if the tenant pleads a recovery by default against his ancestor in praeipe quod reddat, and avers that he had assets per descent, as he ought, the demandant may say riens per descent; and so in all such like cases, where the matter in fact is material, as here. Contra where it is not material, as of a que estate, &c. Br. Traverse, per, &c. pl. 276. cites 22 E. 4. 30. [371]

4. Where matter in fact is alleged by the defendant, as if the defendant says that the plaintiff in appeal named heir is a bastard, the plaintiff shall say that mulier, and not bastard. Br. Traverse, per, &c. pl. 279. cites 22 E. 4. 39.

Heath's Max. 111. cap. 5. cites S. C.

5. Where a recovery with several mesne conveyances are alleged against the plaintiff, or him by whom he claims, there the record shall be traversed, and not the mesne conveyances. Br. Traverse, per, &c. pl. 116. cites 15 H. 7. 2, 3.

(H. a) *Que Estate, or Confirmation.*

1. **A**VOWRY for 10s. the tenant said that J. late lord there *que* estate the tenant has in the seignory confirmed to D. then tenant *que* estate the tenant has in the tenancy, to hold by 1 d. pro omnibus servitiis, and shewed the deed, &c. And the defendant said that the tenant and his ancestors have held of the defendant and his ancestors from such a time, &c. by 10s., &c. absque hoc that he had the estate of I. and the traverse was rejected; for he ought to traverse the confirmation, or that J. had nothing in the seignory at the time, &c. or that D. did not hold of him at the time, &c. per Cur. by which he traversed that J. had nothing in the seignory at the time, &c. Br Traverse, per, &c. pl. 376. cites 30 H. 6. 7.

(I. a) *Seisin in Fee, or Conveyance.*

1. **M**ORTDANCESTOR of the seisin in fee of J. the ancestor of the plaintiff, &c. the tenant said that H. father of the plaintiff whose heir, &c. was seised in fee, and the land is devisable by custom, and he devised to A. for term of life, the remainder to this J. in tail, and the remainder in fee to be sold, and that the tenant for life and the said J. are dead without issue, and conveyed himself to the land by the sale of the fee simple, and shewed the testament of the father, judgment if assise, &c. And per Cur. in this case the plaintiff shall not say that J. was seised in fee, absque hoc that he had anything by the devise, without shewing how he came to it after, by reason that the devise binds as a deed indented. Br. Titles, pl. 49. cites 35 Ass. 1.

So of such pleading in trespass, and when the other party shall take the traverse.
Br. Traverse, per, &c. pl. 209. cites 2 E. 4. 11.

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2. Recordare; A. was seised in tail, and leased to B. and C. for 2 years, and after A. B. and C. leased to F. N. for term of 20 years rendering rent, and A. died, and M. his son ousted the lessee, before which ouster nothing arrear; and this was pleaded in bar of the avowry, which was that A. B. and C. were seised in fee, and all as above, and a good bar to the avowry without traversing that A. B. and C. were not seised in fee at the time of the demise; for if they were seised of any estate of franktenement, they may lease for life; for in assise if the tenant says that E. was seised in fee, and infeoffed him, and gives colour, the plaintiff may say that before this he was seised, and leased to E. for term of life, who made feoffment, and he entered for alienation; and good without traversing the seisin in fee, per Littleton and Choke. Br. Traverse, per, &c. pl. 209. cites 2 E. 4. 11.

3. In formedon, the tenant said that before the gift the donee himself was seised, and infeoffed the donor in fee, who gave to the donee and his feme, the baron being within age, who had issue the mother of the demandant; the feme died, the baron took another feme, and had issue the son now tenant, judgment si actio; and the reason of the bar seems to be, that when the infant made the feoffment, and the feoffee

feoffee re-gave to him in tail, he is remitted in fee by reason of the nonage, and so confessed and avoided the gift; for the entry of the infant was lawful, by which the demandant said that the donor gave as above, absque hoc that the donee infeoffed the donor, prout, &c. Danby said he ought to traverse the seisin before the gift, and not the feoffment; but the other justices held the traverse good, and Littleton the like. Br. Traverse, per, &c. pl. 219. cites 5 E. 4. 5.

4. *In dum fuit infra etatem, nothing shall be traversed but the demise; per Littleton.* And by others it was agreed, that the seisin may be traversed, but not if he had any thing or not. Br. Traverse, per, &c. pl. 219. cites 5 E. 4. 5.

5. *In assise, if I say that I leased to A. at will, who infeoffed the plaintiff, and I entered; this is sufficient, and the feoffment shall not be traversed; per Catesby.* Br. Traverse, per, &c. pl. 219. cites 5 E. 4. 5.

6. *In formedon in descender the tenant said, that before the donors any thing had, he himself was seised in fee, and infeoffed the donors, being within age in fee, by which they were seised, and gave, &c. and after the tenant within age re-entered, and was seised in fee in his remitter, & hoc, &c.* And the demandant maintained the gift absque hoc, that the tenant infeoffed the donors, prout, &c. And by some the traverse is not good; for he ought to traverse the seisin of the infant, now tenant; for the feoffment is only a conveyance; and if he was disseised by the donors, or if they abated and gave, yet the tenant-infant may re-enter. And, per Needham and other Justices, the Court shall not argue nor suppose other title than the tenant himself alleges, though he was an infant; and so because he alleges feoffment it has the force of the bar, and suffices to traverse it. And yet Danby Ch. J. and others were contra, and that the seisin was very material; therefore quære. Br. Traverse, per, &c. pl. 190. cites 5 E. 4. 9.

7. *In trespass the defendant said, that M. was seised in fee, and leased to him for life, and gave colour to the plaintiff; and the plaintiff said, that before this, D. was seised in fee, and leased to E. for life, and died, and the reversion descended to A. feme of the said M. which M. granted the reversion to the defendant for life, and the tenant attorned, and M. died; and after A. granted the reversion to the plaintiff, and E. attorned; and after E. died, and the plaintiff entered, and was seised till the trespass; absque hoc, that M. was seised in fee, prout, &c.* But, per Choke and Littleton, he ought to traverse, absque hoc, that M. leased modo & forma. Quære. But the grant of M. was void, because he died before his feme, and before E. tenant for life. Br. Traverse, per, &c. pl. 233. cites 10 E. 4. 8.

8. *In trespass upon 5 R. 2. the defendant said, that the baron and feme were seised in fee, and the feme died, and after the baron died, and the defendant entered as heir of the baron, and gave colour by the baron and feme.* The plaintiff said, that before the baron any thing had, the feme was seised in fee, and married the baron, who levied a fine to J. S. in fee, who granted and rendered to the baron and feme, and the heirs of the feme, and after the feme died, and the baron also, and

and the plaintiff as heir of the feine entered, and was seised till the defendant ousted him; *absque hoc*, that the baron was seised in fee prout, &c. And the best opinion was, that the traverse is well taken, notwithstanding the fine which gave the right of baron. Quære. Br. Traverse, per, &c. pl. 259. cites 21 E. 4. 17.

But if a man in trespass intitles himself by divers feoffments, as to say, that A. was seised, and infeoffed B. who infeoffed C. who infeoffed D. whose estate

9. In trespass the defendant said, that his father was seised in tail of the gift of N. and died *protestando* seised, &c. and he entered as heir, &c. The plaintiff said, that the plaintiff's father infeoffed A. in fee, who leased to B. for life, the remainder to C. in fee, whose estate the plaintiff has. The defendant said, that his father died *protestando* seised *absque hoc*, that A. leased as above. and the opinion of the Court was, that it is not a good traverse; but he ought to traverse the feoffment made by the father of the defendant. Br. Traverse per, &c. pl. 117. cites 15 H. 7. 11.

the defendant has, and gives colour to the plaintiff by the first seisin, this is not double; and the plaintiff may traverse which of the feoffments he will, for now he conveys by a stranger; per Fineux, & tot Cur. Br. Traverse, per, &c. pl. 117. cites 15 H. 7. 11. — Heath's Max. 119. cap. 5. cites S. C.

But if the defendant says, that the plaintiff was seised, and infeoffed B. who infeoffed C. whose estate the defendant has, now the plaintiff cannot traverse any of the feoffments but only the first, because he conveys by the plaintiff, and destroys his right; per Fineux. Br. Traverse, per, &c. pl. 117. cites 15 H. 7. 11.

But if the defendant say, that A. was seised, and gave to him in tail, and so was seised till by the plaintiff

10. In trespass, if the defendant says, that A. was seised in fee, and infeoffed him, and so he was seised till by the plaintiff disseised, and he re-entered, &c. And the plaintiff says, that B. infeoffed him, by which he was seised till the defendant did the trespass. He ought to say, *absque hoc*, that he disseised the defendant and shall not traverse the feoffment. Br. Traverse, per, &c. pl. 117. cites 15 H. 7. 11.

disseised, and he re entered, the plaintiff may say that N. was seised, and infeoffed him, and so he was seised till the defendant did the trespass; *absque hoc*, that A. gave in tail *modo & forma*, without traversing the disseisin, which was affirmed by Fineux and others at the bar. Br. Traverse, per, &c. pl. 117. cites 15 H. 7. 11. — Heath's Max. 120. cap. 5. cites S. C.

So if he says, that he leased for years to the said T. S. and he made the feoffment, and the plaintiff entered, &c. For it is confessed and avoided.

11. In trespass the defendant says, that T. S. was seised in fee, and infeoffed him, and gives colour; there if the plaintiff says, that before this he was seised of the manor of D. whereof the place is parcel, and held by copy, and leased it to the said T. S. by copy of court-roll, and he infeoffed the defendant, upon whom the plaintiff entered, he need not traverse the seisin of T. S. in fee; for by his entry to make feoffment, and executing of it, he is seised by disseisin. Br. Traverse, per, &c. pl. 5. cites 27 H. 8. 4.

Br. N. C. pl. 407. cites S. C. — D. 112. pl. 48. Hill. 1 & 2 Ph. & M. Bosse v. Waters, seems to be S. C. and

12. In trespass the defendant said, that J. N. was seised in fee, and leased to him for 21 years, and gave colour. The plaintiff said, that his father was seised, and died seised, &c. and he entered, and was seised till the trespass; *absque hoc*, that the said J. N. any thing had at the time of the demise, and an ill traverse: but shall say, *absque hoc*, that J. N. was seised in fee, *modo & forma*, prout, &c. Br. Traverse, per, &c. pl. 372. cites 4 E. 6.

says the traverse was held a jeofail, per tot. Cur. and that the jury ready at the bar was discharged. — And there in the margin it is said, that the traverse ought to have been upon the seisin in fee. — Heath's Max. 117. cites S. C. — S. P. Heath's Max. 116. cap. 5. cites Br. Traverse, 372. and 4 E. 2. [but it seems it should be 4 E. 6.]

13. In *intrusion* brought by the heir upon a lease made by his ancestor, the tenant traversed *that the ancestor never had any thing in the land*, prist, and this was held a good plea; and the demandant maintained the seisin of his ancestor, and his lease also; but upon the seisin only the jury shall be charged. D. 122. b. pl. 23. Mich. 2 P. & M. in an anonymous case, cites Trin. 43 E. 3.

14. In *trespass* the defendant pleaded, *that J. W. was seised, and infeoffed M. and so conveyed a title to himself*. The plaintiff replied, *that A. his ancestor was seised, and so the land descended to him, absque hoc, that J. W. was seised*. Anderson said, the seisin is not traversable but where it is material, and therefore clearly the traverse is not good; and so was the opinion of all the Court clearly. Goldf. 31. pl. 4. Mich. 29 Eliz. Wylgus v. Welche.

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See Replika-
tion (B)
pl. 3. (but
in the last
line of the
note there,
the reader is
desired to
read (does)
mis-printed.)

Instead of the word (shall) it being

15. In *trespass*, &c. the defendant pleaded, *that J. S. was seised and made a lease to him for years, and gave colour to the plaintiff*. The plaintiff replied, *that after J. S. was seised, G. the father of the now plaintiff was seised, and died seised, and that the lands descended to him, absque hoc, that J. S. made a lease to the defendant*. The defendant demurred. And adjudged for the plaintiff, because he had sufficiently confessed and avoided the seisin of J. S. and aptly traversed the lease. Mo. 574. pl. 792. Pasch. 41 Eliz. Rede v. Armiger.

6 Rep. 24.
Mich. 41 &
42 Eliz.
READ'S
CASE, S. C.
and it was
objected,
that the
seisin in fee
was travers-
able, and not
the lease,
because he

alleged a freehold in a stranger; and if in *trespass* the defendant says, that the place where is the franktenement of A. and he by A.'s command, &c. the command is not traversable, if the plaintiff claims by a stranger; for the franktenement being alleged in a stranger, it ought to be answered. But it was adjudged that the traverse was good, and a great diversity between the said cases; for in the one case the pleading is, that at the time of the *trespass* supposed it was the franktenement of A. But in the case at bar the defendant pleaded, that long time before the *trespass* J. S. was seised, and so seised demised; and this might be true, and that G. disseised him, and a descent was cast. So that it is not alleged, that J. S. was seised in fee, as in the other case, and then the material thing to be traversed is the lease. The reporter cites several books, and says it seems upon all those books, that the one or the other, in many cases, is traversable.

16. In *replevin* the defendant avowed *that one E. E. was seised in fee of 3 acres, &c. and married A. and that they had issue B.* That E. E. died and A. was tenant by the *courtesy*; and that B. the heir in reversion, granted a rent of 5l. out of the said 3 acres, to the avowant; [* and shewed the death of A.] The plaintiff replied, *that E. E. was tenant in tail of the 3 acres, and married A. and had issue B. who, in the life of A. granted the rent, [+ and died] absque hoc, that E. E. was seised of the 3 acres in fee*. Issue was joined, and a verdict for the avowant. It was objected, that the traverse of the seisin in fee of E. E. was idle, because the title to the rent is not derived from her; but that he ought to have traversed the seisin of B. But per Cur. though it be not good, yet, it being after a verdict, it was helped by the statute of jeofails. Yelv. 54. Mich. 2 Jac. B. R. Pigot v. Pigot.

Brownl.
183. Mich.
20 Jac. S. C.
but seems
mis-printed
for 2 Jac.
but other-
wise seems a
translation
from Yel-
verton.
* Cro. J.
44. pl. 11.
Mich. 2. Jac.
S. C. And
Gawdy J.
was of opi-
nion, that
the only

thing material was how B. was seised, and therefore the issue taken was ill. But all the other justices held, that in regard the seisin in fee is especially alleged in E. and the conveyance of the reversion to B. as it ought to be of necessity; for otherwise the reversion cannot be conveyed unto him), therefore the seisin alleged in her might be well traversed; and if it be not an apt issue, yet it is aided by the statute of 32 H. 8. for it is an issue, although it be not an apt issue; wherefore it was adjudged accordingly for the avowant.

2 Roll. Rep. 362. **BAKER v. BLACKAMORE**, S.C. says, the defendant pleaded that A. was seised in fee, and infeoffed J. D. to the use of B. in tail, and claimed under the entail; the plaintiff replied that A. was seised in fee, and

17. *Trespas*s. The defendant pleaded, that A. was seised in fee, and made a gift in tail to B. which descended to 4 daughters, &c. The plaintiff replies that A. was seised in fee and gave the lands to B. and to his heirs males; and the plaintiff claims the intail as heir male, and the defendant's under the general tail, *absque hoc*, that A. was seised in fee. Dodderidge J. said, the seisin in this case is traversable. And Ley Ch. J. said, take away the seisin, and then no gift, and therefore the seisin here is traversable. Haughton and Chamberlain, Justices, agreed. The Court resolved, that either the seisin in fee, or the gift in tail, is traversable. And Dodderidge said, if they both convey from one and the same person, then they must traverse the conveyance; * and cited 6 Rep. 24. where the books are cited which warrant the traverse of either; and it was adjudged for the plaintiff. Godb. 427. pl. 497. Trin. 21 Jac. in B. R. **Baker v. Blackamore**.

made a feoffment thereof to him, and he continued seised till the defendant did the trespass, *absque hoc* that A. infeoffed J. D. in fee; and adjudged ill, because he ought not to traverse the conveyance, when the claim is from several persons; for there the last feoffment or last dying seised is traversable only; but when both plaintiff and defendant claim from one person, the conveyance may be traversed. — Cro. J. 681. pl. 18. **Baker v. Blackman**, S. C. adjudged for the plaintiff, that in this case he might traverse either the seisin in fee alleged in the bar, or the gift in tail.

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18. In *trespas*s the defendant pleaded, that C. S. was seised in fee of the land, and that it was extended on an outlawry; and that he, by the sheriff's command, entered upon a *levari facias*, &c. The plaintiff replies *protestando*, that C. S. was not seised, says, that the master and fellows of, &c. were seised in fee, and that, before the outlawry, and the inquisition thereon, they demised to the plaintiff, *absque hoc*, that the close, in which, &c. was contained in the inquisition. The plaintiff had a verdict. It was moved in arrest of judgment, that the traverse was ill, and that the seisin in fee, and not the being comprized in the inquisition, ought to have been traversed. But per Cur. the traverse is good; for any part of that which the defendant makes his title is traversable. Besides the seisin in fee is not material in this case, because the justification is by command of the sheriff, who had authority by virtue of the extent and *levari fac.* though C. S. never had been seised. Judgment for the plaintiff. Hard. 316. Mich. 14 Car. 2. in the Exchequer, **Moor v. Pudsey**.

19. In *trespas*s, if the defendant alleges a seisin in fee in J. S. and a demise to himself, the plaintiff may traverse either the seisin in fee or the demise at his election. Hard. 317. Mich. 14 Car. 2. in case of **Moor v. Pudsey**.

In this case Windham said, that if in *trespas*s the defendant pleads that J. S. was seised in fee and infeoffed; and the plaintiff replies, that

20. In *trespas*s S. the defendant pleaded that A. was seised in fee and leased to B. for 3 lives, who assigned to S. who thereupon put his beasts into the common. Plaintiff replies *absque hoc*, that A. was seised in fee when he made the lease. Defendant confessed that A. was tenant for life and infeoffed B. but that before A. was seised, W. R. was seised and levied a fine to the use of himself the reversion to T. R. who infeoffed the lessor of the plaintiff. Defendant rejoins and confesses the fine, but said that T. R. died before A. *absque hoc*, that T. R. infeoffed the lessor of the plaintiff. The plaintiff demurred. Windham conceived

ceived the traverse was most proper, and it is not like the confessing that lease for years infeoffed, which would be admitting a fee in him, but not so of tenant for life; and further the seisin of A. is not here sufficiently confessed without a traverse; for if A. had fee, the under-leases are good, else not. And judgment for the plaintiff, nisi. Keb. 374. pl. 73. Mich. 14 Car. 2. B. R. Holden v. Swindall.

he was seised in fee and leased to J. S. for life abque hoc, that J. S. was seised in fee, it is good; and per Curiam, v. Swindall.

this nor the case at bar cannot be pleaded otherwise. Keb. 374. in case of Holden

21. In an action upon the case for a nuisance in stopping lights; upon demurrer it was ruled per Cur. that if in *trespass* or action upon the case, one declares that J. S. was seised in fee and leased to him, and the defendant pleads that J. N. was seised in fee and leased to him, &c. this seisin of J. N. shall be intended by disseisin; for the defendant ought to have traversed the seisin of J. S. and to say that a long time before, such a one was seised, &c. Sid. 227. pl. 22. Mich. 16 Car. 2. B. R. Palmer v. Flechees.

Raym. 87. S. C. but S. P. does not appear. — Lev. 122. S. C. but S. P. does not appear.

22. In *trespass* the defendant justified by licence made the day before the trespass, by S. who was seised; the plaintiff demurred because he does not say that S. was seised at the time of the trespass, and so the plaintiff can make no traverse; sed Curia contra, the plaintiff may traverse the licence, which will bring the freehold and seisin of S. in issue, or he may take the license by protestation, and traverse the seisin of S. because his seisin shall be intended to continue, albeit the pleading had been more formal to say tempore quo, and long time before S. was seised; but this is not matter of substance; and judgment pro plaintiff nisi. 2 Keb. 266. pl. 25. Mich. 19 Car. 2. B. R. Thacker v. Cumberbeech.

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23. In *replevin* the defendant avows for the moiety of certain rents, and sets forth, that A. B. anno 83. demised to one H. rendering rent, and afterwards assigned the moiety of the reversion, &c. The plaintiff replies, that the defendant at the time of the distress was seised of a moiety, and M. C. heretofore was, and her son now is seised of a moiety; the Chief J. said he should have traversed the original seisin at the time of the lease. Judgment for the avowant. Comb. 230. Mich. 5 W. & M. in B. R. Turner v. Fuller.

(K. a) Seisin in Fee, in Tail, or Franktenement.

1. **I**N trespass, the one intitled himself by special tail by gift to his father and mother and the heirs of their bodies, who had issue the feme of the defendant; the other said that the gift was to the father and mother, and the heirs of the body of the father, who had issue the son now plaintiff by a second wife; and no plea without traversing the special tail in the bar. Br. Traverse, per, &c. pl. 286. cites 9 H. 6. 9.

2. Entry in nature of assise; the tenant said that W. was seised in fee, and infeoffed him and gave colour to the plaintiff, and the plaintiff said that W. was seised in fee in jure uxoris, and had issue by her,

her, and the feme died, and W. was seised as tenant by the curtesy and infeoffed the tenant, absque hoc, that W. was seised in fee modo & forma, &c. and the others e contra; and some doubted if he need traverse or not, therefore quære; but it seems the traverse is well taken. Br. Traverse, per, &c. pl. 375. cites 30 H. 6. 4.

He ought to have traversed the seisin in fee which was alleged. Poph. 113. in case of Holmes v. Gee, Popham, and Clench, cited 18 E. 9. 4. 3.

3. In trespass the defendant justified the entering and cutting of corn, because C. M. was seised of the place in fee, and sowed the land, and the defendant as servant to him, &c. entered and cut it, &c. The plaintiff said that the land was his franktenement at the time, &c. absque hoc, that it was the franktenement of C. M. And per tot. Cur. he ought to traverse the seisin in fee, quod nota; for the franktenement of C. M. was not pleaded in the bar, but his seisin in fee. Br. Traverse, per, &c. pl. 254. cites 18 E. 4. 3.

Br. Replication, pl. 45. cites S. C. — Heath's Max. 117. cap. 5. cites S. C.

4. [In trespass.] The defendant alleged that his father was seised in fee, and the plaintiff said that J. S. was seised in fee and leased to him for 9 years, and after he held over his term, and the lessor entered and gave to the plaintiff in tail, &c. And a good plea without traversing the seisin in fee in the father of the defendant; for when he holds over his term it is a doubt in the law, whether he has seisin in fee thereby. Br. Traverse, per, &c. pl. 277. cites 22 E. 4. 38.

5. Avowry was made for a rent charge in fee, supposing the grantor seised of the place where, &c. in his demesne as of fee at the time of the grant. The plaintiff shewed that the grantor was seised of an estate tail at the time of the grant, and shewed of whose gift the tail was, and that the grantor was dead, and that he was his issue and heir of his body, &c. This is not good without traversing the fee-simple, by the opinion of Mounson, Harper, and Dyer; but Manwood e contra. D. 280. b. in pl. 16. cites Mich. 14 & 15 Eliz. Anon.

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S.P. by Hobart Ch. J. Hob. 105. at the end of the case of Digby v. Fitzherbert. For, as it was held Yel. 195. in case of Tatem v. Perient, every matter of fact alleged by the plaintiff may be traversed, and defendant by way of traverse may answer the matter alleged in the same words.

6. Avowry for damage feasant in W. &c. The plaintiff replied that he is seised in fee of B. which is the close adjoining, and the defendant and those whose estate, &c. time out of mind have used to inclose against B. The defendant rejoined that B. was the franktenement of G. and traversed the seisin of the plaintiff in fee at the time when, &c. the plaintiff demurred. The Court was of opinion that the precise estate which the plaintiff had in B. was not traversable, if the plaintiff had said only in general that he was seised, without saying of what estate, and had only said it was his franktenement; and then the other side must have said that he had nothing in it; but now this special traverse of the estate in fee is good, because the plaintiff had given advantage to do so, whereas otherwise it had been ill; for if he had but an estate for years, or at will or sufferance, or common, or licence only to put in his beasts pro hac vice, it suffices; contra if but a trespasser. Bnt Windham doubted. D. 365. pl. 32. Mich. 21 & 22 Eliz. Sir Fra. Leake's case.

7. In waste the plaintiff set forth that he was seised in fee, and made a lease to the defendant for years, who committed waste; the defendant pleaded that R. H. was seised in fee, who conveyed to the defendant in fee, who re-granted to the plaintiff and his heirs so long as R. H. should have issue of his body, whereupon the plaintiff entered and made the lease to the defendant prout, &c. and that R. H. died at D. without issue of his body; the plaintiff had judgment in C. B. and it was affirmed in B. R. for the seisin in fee set forth by the plaintiff as in himself shall be intended an absolute fee since the defendant does not disclose any estate but a determinable fee in the plaintiff which differs from that alleged by the plaintiff, and so not good without a traverse. Yelv. 140. Mich. 6 Jac. B. R. Ewer v. Moile.

Cro. E. 77.
Ewer v.
Moile is a
D. P. —
Mo. 665.
pl. 408. is a
D. P. —
Lane, 83.
is a D. P.

(L. a) Seisin, or Tenure, &c.

See Avowry.

1. **I**N rescous the seisin is not traversable; for a man may distrain who never was seised. Br. Seisin, pl. 29. cites 5 E. 4. 62. S.P. but the tenure is Keilw. 31.
b. pl. 3. Mich. 13 H. 7. Anon. per Fineux and Rede Justices.

2. **C**ontra in replevin; for there the seisin is traversable. Br. Seisin, pl. 29. cites 5 E. 4. 62. In replevin the defendant made
conusance as bailiff to the earl of B. and shewed that the lands were parcel of such a chantery, which came to E. 6. by the stat. of 1 Ed. 6. and pleaded the saving in the statute; by which the rights of others were saved, and shewed that so much rent was behind, &c. The plaintiff replied that the lands were out of the fee and seignior of the earl, &c. This was ruled to be no plea, because he confessed so much by the avowry; but this is for rent reserved by the saving of the act of parliament, and is a rent-seck distrainable for the privilege which was before; but he may traverse the tenure, (viz.) absque hoc, that at the time of the making the statute, or ever after the lands were bolden of the said earl. Winch. 77. Pasche 22 Jac. Stephens v. Randal.

3. **B**ut in cessavit the cesser shall be traversed and not the seisin. Br. Seisin, pl. 29. cites 5 E. 4. 62. In cessavit the tenure is traversable
and not the seisin per Fineux and Rede J. Keilw. 31. b. pl. 3. Mich. 13 H. 7. Anon.

4. **A**nd in writ of escheat the tenure shall be traversed, but not [378] the seisin. Br. Seisin, pl. 29. cites 5 E. 4. 62.

5. **S**o in right of ward, and in writ of * ravisment of ward. Br. Seisin, pl. 29. cites 5 E. 4. 62. If in ward or ravisment of

ward, the defendant pleads feoffment of the father of the infant, he shall say absque hoc that he died his tenant, and not that he did not die seised. Br. Traverse, per, &c. pl. 49. cites 14 H. 4. 16. —
Br. Ejectione, &c. pl. 3. cites 13 H. 4. 17. S. C.

The possession, nor the seisin in ravisment of ward, nor in ejectionment of ward, is not traversable. Br. Traverse, per, &c. pl. 50. cites 14 H. 4. 24. Per Thirn and Hill.

Per Catesby, if lord and tenant are, and the tenant is disseised, and dies, and the lord brings writ of ward, supposing that the tenant died in his homage, this dying seised is not traversable; for the lord shall have the ward, though he does not die seised, because he died in his homage. But Brooke says, see the writ and the count thereof among the entries; for it seems that the lord shall say that he died in his homage, and not that he died seised of the land. And in writ of ward by the lord of the ward of the heir of the mesne, supposing that the mesne died seised in fee, this is not traversable. But see that the entry in writ of ward, and in ravisment of ward, is no more but that he died in his homage. Br. Traverse, per, &c. pl. 255. cites 18 E. 4. 5.

* S. P. Per Fineux and Rede J. Keilw. 31. b. pl. 3. Mich. 13 H. 7. Anon.

S. P. *But in avowry, the which is in the possession, the seisin is traversable, and not the tenure; for the avowant shall have judgment there to have return for the services. And so the difference has always been taken between action of trespass and avowry.* Kelw. 31. b. pl. 3. Mich. 13 H. 7. Anon. Per Fineux and Rede J.

As in replevin the defendant avowed, because the plaintiff held of him one acre by homage, fealty, and escuage, 7. *Where the plaintiff confesses the same tenure that is in the avowry, and of the same nature, but he holds by less rent, there the plaintiff shall answer to the seisin. * But if the defendant avows for service of chivalry, and the plaintiff says that he holds in socage, there he shall traverse the tenure, and not the seisin; per Nele J. and Brian Ch. J. agreed it to be a good diversity. Br. Avowry, pl. 104. cites 20 E. 4. 16.*

and 2 s. rent, and alleged seisin by the bands of the plaintiff as his very tenant, &c. and for 2 s. arrears at Easter he avowed. Vavisor said he ought not to avow; for we hold this acre by fealty and 2 d. of which services, &c. absque hoc that we hold of you by homage, fealty, and escuage, and 2 s. rent, modo & forma, &c. Per Hussey, you ought to traverse the seisin, and not the tenure, as here. And per Brian Ch. J. he shall traverse the seisin; for the escuage makes the service of chivalry, and the defendant has alleged seisin in the other service, and not in the escuage; and therefore he shall traverse the seisin of them, viz. of the 2 s. and of the homage; for all this may be socage; and therefore he shall traverse the seisin of that which makes the socage tenure, but not the service of that which makes the service of chivalry. Br. Avowry, pl. 104. cites 20 E. 4. 16.

And per Hussey, in avowry for tenure by 10 d. and alleging seisin, &c. the plaintiff may say that he holds of him by a hawk, absque hoc that he holds of him by 10 d. and shall not answer to the seisin; quod Brian concessit. Br. Avowry, pl. 104. cites 20 E. 4. 16.

* S. P. Per Fineux and Rede J. and per Rede J. the tenure is traversable, though they do not vary in the tenure, in some cases in avowry; as if the avowant shews the commencement of his tenure, and he shews before the statute of, &c. and since time of memory, and shews when his ancestor was seised of the same lands where the taking, &c. and infeoffed, &c. to hold of him by fealty and certain rent payable, &c. and for so much, &c. In this case the tenure is traversable, and not the seisin. Kelw. 31. b. pl. 3. Mich. 13 H. 7. Anon.

9 Rep. 35. a. in BUCKNAL's case, it is observed by the reporter, that where it is said that when the lord varies in the nature and quality of the services, that the tenure is traversable, this is true when the tenant confesses the tenure in part, but he cannot traverse all the tenure; as if the defendant in replevin avows upon the plaintiff for rent and services, as upon his very tenant, the plaintiff cannot say that he holds the same land of a stranger, absque hoc that he holds of the avowant; but he must disclaim or plead hors de son fee; and says that with this agrees 10 H. 6. 6. b. and 7. a. 35 H. 6. tit. Avowry, 28. 37 H. 6. 25. a. 11 H. 4. 11. 9 E. 2. Avowry, 222. 15 E. 2. Avowry, 214.

S. P. Mar. 175. Hill. 17 Car. C. B. in case of LAYTON v. GRANGE, by Banks Ch. J. that where the lord and tenant differ in the services, the traverse shall be of the tenure and not of the seisin; but where they agree in the services the seisin may be traversed; and cites 21 E. 4. 64. and 84. 20 E. 4. 17. 22 Aff. 68. and 9 Rep. 33. Bucknall's case.

8. In assise of rent, the tenure is traversable, and not the seisin; per Fineux and Rede J. Kelw. 31. b. pl. 3. Mich. 13 H. 7. Anon.

[379] 9. In replevin the defendant avowed, for that the plaintiff held of him one acre of land in the place where, &c. by fealty, and 16 s. rent payable at two feasts; the plaintiff replied that he held of the avowant the same acre, and two more by fealty, and 16 s. rent payable at one day, absque hoc that he held the said acre by the services payable at 2 days, it was objected that the plaintiff ought not to traverse the tenure. But Walmesley contra; for if he should traverse the seisin, that would be a confession of the tenure, quod Periam concessit; and said that the difference commonly taken in the books is, that where the parties agree in the tenure, there the seisin is traversable, et vice versa; and he conceived that the payment at two days alters the tenure. Godb. 24. pl. 34. Trin. 26 Eliz. C. B. Throgmorton v. Terringham.

(M. a) *Seisin sole, or joint.*

1. **I**N *ravishment of ward*, the plaintiff claimed the heir as heir of *H. who died seised, &c.* and the defendant said that *A. was seised in fee before that H. any thing had, and took H. to baron, and had issue the infant, absque hoc that H. was sole seised at the time of his death, &c.* and the others *e contra*; and the plea held good. Br. Traverse per, &c. pl. 142. cites 37 H. 6. 31.

In ravishment of ward the defendant said that the ancestor and J. N. were jointly seised, and J. N.

survived; this is sufficient without traversing the sole seisin; for the writ and declaration is only *supposal*. Br. Confess and Avoid, pl. 61. cites 1 E. 4. 9. and 2 E. 4. 28, 29. accordingly.

But in *ravishment of ward* by executors, who counted that *A. was seised in fee, and held of their testator in chivalry, &c.* and died, his heir within age, by which the lord seised him and died, and the executors plaintiffs were possessed, and the defendant ravished him; the defendant said that the father of the infant was only seised in right of J. his wife now defendant, and the father died, and she survived and seised the infant her own son, &c. And per Cur. this is no plea, without traversing *absque hoc* that the father died seised in fee prout, &c. Br. Traverse per, &c. pl. 255. cites 18 E. 4. 5.

2. In trespass, if *sole dying seised* be pleaded in bar, title, or replication, &c. and avoided by joint estate in him and in another who survived, there he shall traverse the sole dying seised; for bar, title, replication, and such pleadings are *matter in fact*. Br. Confess and Avoid, pl. 61. cites 1 E. 4. 9.

Br. Brief, pl. 339. cites S. C.—Br. Traverse per, &c. pl. 205. cites S. C.

S. P. Ibid. pl. 213. cites 2 E. 4. 28, 29.

3. But where such dying seised is alleged in *ayel, besayel, and mortdancestor, &c.* there it is sufficient to plead the jointure in him and another, and that the other survived; and well without traverse; for writ and declaration is not but *supposal*; quod nota by both courts of B. R. and C. B. Br. Confess and Avoid, pl. 61. cites 1 E. 4. 9.

Br. Brief, pl. 339. cites S. C.—Br. Traverse per, &c. pl. 205. cites S. C.—S. P. Ibid.

pl. 213. cites 2 E. 4. 28, 29.—S. P. Cro. E. 795. pl. 41. in case of Cowper v. Temple.

4. Where a man pleads jointenancy in *assise, or praeipe quod reddat, or seisin in jure uxoris*, judgment of the writ; this is sufficient without affirming seisin in fact, or traversing the sole seisin, where the seisin is in *jure uxoris*; for the writ is only *supposal*, but title is matter in fact, therefore otherwise it shall be there. Br. Traverse per, &c. pl. 237. cites 10 E. 4. 16.

5. In dower, if the tenant alleges jointenancy in the baron, and in J. J. who survived, the feme shall say that he was sole seised, *absque hoc* that they were jointly seised. Br. Traverse per, &c. pl. 279. cites 22 E. 4. 39.

Heath's Max. 111. cap. 5. cites S. C.

6. Replevin; the defendant made cognizance as bailiff to Sir Anthony Cook for damage feasant in his freehold; the plaintiff said he held the land in coparcenary with the said Sir Anthony, as coheirs to Sir Edw. Belknap: and Harper and Weston thought it not good without a traverse of the sole freehold of the said Sir Anthony, but Welsh and Dyer *e contra*; and at length issue was joined upon the coparcenary, and not whether the intire was the coparcenary of Sir A. which is only *supposal* as a declaration; and this plea of coparcenary is only in abatement of the avowry

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in effect. D. 280. b. pl. 15. Mich. 10 & 11 Eliz. Sir Ant. Cooke's case.

7. In replevin the defendant *avowed*, for that a copyhold was granted to the defendant and B. C. D. and E. and that C. D. and E. died, and afterwards B. died, whereby the defendant was in by survivorship, and so is sole seised, and took the cattle damage feasant; the plaintiff confessed the grant, and that C. D. and E. died, and that B. and the defendant survived; but says that B. afterwards surrendered his part to a stranger, who surrendered to the plaintiff, *absque hoc* that the defendant was sole seised at the time of the taking. It was objected that the sole seisin was not traversable, but the survivorship only; and that the jointenancy and survivorship are confessed and avoided, and so the traverse is double. But per tot. Cur. the traverse is good; for the sole seisin being alleged by the defendant by way of bar precisely and materially, it ought to be traversed. Cro. E. 795. pl. 41. Mich. 42 and 43 Eliz. C. B. Cowper v. Temple.

8. In trespass brought by M. widow, &c. the defendant pleaded that before the trespass B. her husband was seised in fee, and so seised died, whereby the lands descended to C. his son and heir, who demised it to the defendant, by virtue whereof he entered; the plaintiff replied that before C. any thing had, &c. A. his grandfather was seised in fee; and in consideration of a marriage between B. and M. the plaintiff, he made a feoffment to them and to the heirs of B. on the body of M. to be begotten, remainder to B. in fee, *absque hoc* that B. died seised in fee modo & forma prout, &c. Upon demurrer it was adjudged for the plaintiff, because no dying seised is pleaded so as it might be traversed, but with a sic seistus obiit. And the only matter traversable here is the seisin in fee modo & forma; for the replication has confessed a joint-seisin of B. and M. and to the heirs of the body of B. with a fee-simple in B. and that is good with the traverse. Hutt. 123. Trin. 9 Car. Edwards v. Laurence.

Freem. Rep. 202. pl. 205. S. C. says, it was agreed that when a dying seised is alleged generally, it shall be intended a sole seisin. And says, it was argued, that the plaintiff ought to

9. In trespass for taking his horse, the defendant justified that he was seised of such lands, and intitles himself to an heriot; the plaintiff replies that J. S. was jointly seised with the defendant, & hoc paratus est verificare. The plaintiff demurred generally, because the plaintiff should have traversed the sole seisin. It was answered that he need not traverse the sole seisin, because the matter alleged by him avoids the bar without a traverse. The Chief J. held the traverse of the sole seisin necessary, because it is issuable; and the other justices (absente Ellis) were of the same opinion; and gave judgment for the defendant. 2 Mod. 60. Mich. 27 Car. 2. C. B. Snow v. Wiseman.

have traversed the sole seisin, because otherwise there are only 2 affirmatives, and yet no confessing nor avoiding neither; and 2 affirmatives cannot make any issue. And he cited 22 H. 6. 23. 1 Bulst. 48. 3 H. 7. 10, 11. And that there was a great difference between jointenancy pleaded in the bar, where a sole seisin is alleged in a count or declaration, and when it is in the replication, when a sole seisin is alleged in the bar; but the count is but as supposal, and so need not be traversed; as the bar must where it is contradicted, because the bar must be more certainly and positively alleged, and cited 1 Ed. 4. 9. Bro. Trav. 279. Yelv. 140, 141. and 3 Cro. 230.

10. In replevin for taking his cattle, the defendant made *conu-
fance*, that *A. was seised of the place where, &c. in fee, and that by
his command he took the cattle damage feasant*. The plaintiff replied,
*that he was seised of one 3d part, and put in his cattle, absque hoc
that A. was sole seised*. Upon demurrer the plaintiff had judg-
ment; for the defendant made *conu-
fance* that his master was
seised, which must necessarily be intended sole seised; and what-
ever is necessarily intended, or implied, is traversable, as well as
if it were expressed; therefore though the defendant *alleged a
seisin in fee generally only, yet that being intended a sole seisin,
the plaintiff may traverse the sole seisin; and since the plaintiff
makes himself tenant in common with the defendant, it had not
been enough to say, that he is tenant in common with the defen-
dant, without traversing his sole seisin, or that he was seised *modo
& forma*. 2 Salk. 629. pl. 6. Pasch. 3 Annæ, B. R. Gilbert v.
Parker.

6 Mod. 158.
S. C. and
Holt Ch. J.
for the al-
leging him-
self to be
tenant in
common
with him, is
not a con-
fession and
an avoid-
ance. And
whereas the
case of D.
280. [above]
had been ob-
jected, he
said, 1st,
that the
Court were
divided upon

it. And 2dly, there may be a difference between coparceners and jointenants, and tenants in common; for the two first are seised, per my & per tout; but the last has a several seisin; and here, to introduce his traverse, he must make himself some title, to enable him to controvert with the defendant.

* [381]

(N. a) Seisin in general.

1. [T was held, that if a man brings writ of right, and counts
upon seisin of his ancestor, or upon his own seisin, this sei-
sin is not traversable; but he may tender the half-mark to in-
quire of the seisin. But if such recovery by writ of right be
pleaded in bar in another action, the demandant may traverse the
seisin by way of falsifying; and note, that at this day the *seisin in
every action is traversable by the statute of new limitations*. Br. Tra-
verse per, &c. pl. 338. cites 10 E. 4. 9.

2. A writ of entry, in nature of an assise, was brought against
A. who pleaded, in abatement of the writ, that before the seisin and
disseisin supposed, E. was seised in fee of this land, and being so sei-
sed, leased the land to him and his wife for their lives, and that his
said wife is in full life at Dale, and is not named in the writ. The
plaintiff replies, that long after the seisin of E. of the lands afore-
said, he was seised in fee of the said lands, and leased them to E. for
life; and that E. being so seised, made the said lease for lives to A.
and his wife, and that he entered for the forfeiture, and was seised till
A. entered and ousted him. This is a good replication, without tra-
versing the seisin in fee of E. for that was confessed and avoided
before; for when E. made a lease for life to the husband and
wife, he gained a wrongful fee to himself by this lease; which
fee is destroyed by the entry of the demandant for the forfeiture,
as is also the jointenancy between A. and his wife. Jenk. 105. pl. 1.

3. Where seisin is materially alleged in a real action, in a bar,
replication, or title, it ought to be traversed; and the *confession and
avoidance of joint seisin and survivorship will not serve*; for the alle-
gation of seisin is positive, and is to be understood sole seisin.
Jenk. 117. pl. 34.

But where
the seisin
is alleged by
way of sup-
position, as in
a writ of
ayel or mort-
gage, there
a con-

descender, where the dying seised of the ancestor is alleged by the words *&c. quod cum* in the

a confession and avoidance will serve, for the reason aforesaid; and so if, in the writ of avel, the seisin is alleged in the avel ut dicitur. In mortdancester the writ is for the jury to inquire whether the ancestor of the demandant died seised. Jenk. 117. pl. 34.

2 Le. 80.
Pl. 107.
HERRING
v. BAL-
LOCK,
S. C. and
the demur-
rer was, be-
cause by that
bar, the lease
set forth in
the avowry
was not an-
swered; for
that the
plaintiff in
the avowry
ought to

4. In replevin, &c. the defendant avowed the taking, &c. damage feasant, setting forth, that one J. was seised in fee, &c. and demised the land to him for 21 years, &c. The plaintiff replied, that before J. was seised, king H. 8. was seised in fee, &c. and made a grant thereof, by copy of court-roll in fee. It was objected, that the plaintiff should have traversed the seisin in fee in J. who might come to the land by a good title of puisne time. Wray said, there is no question but where the defendant alleges a seisin in one from whom he claims, there the plaintiff cannot allege a seisin in another from whom he claims before the *seisin of, &c. without traversing, confessing, and avoiding the seisin alleged by the defendant. And judgment was given for the avowant. Cro. E. 30. Trin. 26 Eliz. B. R. Herring v. Blucklow.

have concluded thus, (viz.) and so he was seised by the custom till the avowant, pretextu of the said lease for years, entered; and so it was adjudged. — 3 Le. 94. pl. 186. S. C. in the same words.

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(O. a) Title, or Intrusion.

Heath's
Max. 113.
cap. 5. cites
S. C.

1. **D**ETINUE of a box of charters, bailed by T. to the defendant to deliver to the plaintiff. The defendant said, that they concerned the manor of B. whereof he himself is seised, and was possessed of the box of charters till the said T. took them, and after he bailed them to the defendant, as in the declaration; by which he retained them, as lawfully he might. The plaintiff said, that before that the defendant any thing had, R. was seised of the manor, and possessed of the charters, and gave them to the said T., who delivered them to the defendant, and after R. died seised, and the defendant intruded. And the defendant rejoined and maintained the bar, absque hoc, that he intruded after the death of R. prout, &c. And, per Cur. this is not traversable; for the substance is the title of R. which ought to be traversed. Br. Traverse per, &c. pl. 196. cites 5 E. 4. 85.

(P. a) Necessary in what Cases.

Every bar
ought to be
answered by
confession and
avoidance,

or traverse, unless in special cases, (or by denial thereof may be added; for this is commonly said to be part of this rule.) 2 Lutw. 1625. Trin. 1 Annæ, in the Appendix, by the reporter in the case of Walters v. Hodges.

1. **T**O all bars that are pleaded in the affirmative, the plaintiff, in his replication, ought either to traverse the bar, or confess and avoid the same. Brown's Anal. 10.

2. In trespass the defendant said, that the place is his franktenement, &c. The plaintiff said, that J. P. was seised in fee, and infeoffed him, by which he was seised till the defendant did the trespass; and he re-entered, and brought the action. The defendant said, that N. was seised, and died seised, and his heir entered, and died without issue.

issue; and the defendant as heir entered, and shewed how heir, &c. and of such estate he was seised at the time of the trespass. And the opinion was, that it is no plea; for he has not traversed the replication, nor confessed and avoided it; for it may be, that the defendant disseised the plaintiff, and infeoffed N. who died seised, and to whom the defendant is heir, and he shall not take advantage of this descent. Br. Replication, pl. 18. cites 7 H. 6. 31.

3. Where the plaintiff alleges a negative, the defendant may answer in the affirmative without traverse. Br. Traverse per, &c. pl. 63. cites 7 H. 6. 43.

As in disseisin, because the defendant sued the plaintiff in

debt in the name of M. without his assent, the defendant said, that he retained him at B. &c. by which he sued him with assent of M. without traverse, and well. Br. Ibid.

4. In trespass the defendant said, that he and A. did the trespass, [383] to which A. the plaintiff has released, &c. by this deed, &c. The plaintiff said that A. did not do the trespass; but thereof is not guilty; and a good replication. Br. Replication, pl. 64. cites 11 H. 6. 35.

5. Dower against R. and J.—R. pleaded nontenure generally; and J. answered as tenant of the entiertie, and pleaded in bar; and no plea, without saying *absque hoc* that R. any thing had, by which he said accordingly. But after Newton agreed the plea good without the traverse. Br. Several Tenancy, pl. 17. cites 22 H. 6. 44.

6. Where the one party traverses, the other, who rejoins to him, shall not traverse also; but it suffices to maintain the writ. Br. Maintenance de Brief, pl. 14. cites 9 E. 4. 36.

7. When the tenant pleads in the negative, it suffices for the defendant to answer in the affirmative. Br. Maintenance de Brief, pl. 14. cites 9 E. 4. 36.

As where he pleads nontenure, it suffices for

the other to say, that tenant the day of the writ purchased, &c. Ibid.

8. In assise the tenant pleaded feoffment of the ancestor of the plaintiff with warranty, whose heir he is. The plaintiff said, that the same ancestor is yet alive at D. in the county of N. and a good replication. Br. Replication, pl. 63. cites 11 E. 4. 18.

9. In assise, if the tenant pleads feoffment with warranty of the father of the plaintiff simply, the plaintiff may say, that it was upon condition, without traverse, that it was not simply; for it is no defect in the bar. Br. Nugation, pl. 15. cites 15 E. 4. 24.

10. In appeal of death by the heir, it is a good plea that he has an elder brother who is heir, without traversing that the plaintiff is heir; per Hussey Ch. J. Br. Traverse per, &c. pl. 279. cites 22 E. 4. 39.

So in appeal by a fine, to say that she was not lawfully accoupled, &c.

Br. Ibid.———So to allege *cutlawry*. Br. Ibid.———And in those he shall not traverse the next heir, nor the lawfully accoupled. Br. Ibid.

11. In formedon, if the tenant pleads feoffment of the ancestor with warranty and assets descended, it is a good replication that after the assets descended, and before the action brought, J. N. had recovered the assets by elder title, and had sued execution; quod nota by all the justices arguendo in trespass. Br. Replication, pl. 66. cites 1 E. 5. 3.

12. Where the one alleges dying seised in tail, and the other dying seised in fee, there are 2 affirmatives; and therefore there ought to be a traverse, and because not, therefore ill by the best opinion. Br. Confess and Avoid, pl. 64. cites 5 H. 7. 11, 12.

† S. P. Per
Hussey Ch.
J. Br. Tra-
verse per,
&c. pl. 279.
cites 22 E.
4. 39.

13. In some case plea shall be good without traverse for the mischief of the trial, as where a man † pleads bastardy, the other says that mulier, and well; quere inde, without saying, and not bastard. Br. Traverse per, &c. pl. 187. cites 6 H. 7. 5. Per Hussey and Fairfax.

14. But where the thing is to be tried ultra mare, there it is good law, that he need not traverse. Br. Traverse per, &c. pl. 187. cites 6 H. 7. 5.

15. Where one justifies by lease from J. S. the plaintiff says that J. S. infeoffed him before, it is not good without traverse. Cro. E. 754. pl. 17. Pasch. 42 Eliz. C. B. in Covert's case.

16. When a matter is expressly pleaded in the affirmative, which is expressly answered by the other party in the negative, there a traverse is needless, because there is a sufficient issue joined, as 36 H. 6. 15. is Cro. E. 755. pl. 18. Huish v. Philips.

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Yelv. 38.
Pasch. 1 Jac.
HUGHES v.
PHILLIPS,
S. C. And
though several excep-
tions were
taken to the
judgment,
upon error
brought
thereupon,
the judg-
ment was
affirmed in
B. R. Per
Tot. Cur. in
omnibus.—
affirmed.

17. As where A. was bound in a statute merchant to B. the defendant in 600 l. to the use of C. defeasanced, that if he paid such sums at such days, the statute should be void. In audita querela by A. he shewed that he was paratus at the said days and places to pay & obtulit the said * sums, and C. was not there to receive them. The defendant pleaded that at such a day C. was at the place where, &c. and demanded the sum, and neither the plaintiff, nor any for him, were there to pay it, absque hoc that the plaintiff obtulit the said sum at the said day, &c. and thereupon the plaintiff demurred. It was held, that the traverse was not good; for there being an express affirmative before, quod paratus fuit, & obtulit, &c. and non obtulit, being an express negative, there shall not be any traverse; wherefore it was adjudged for the plaintiff. Cro. Eliz. 754, 755. pl. 18. Pasch. 42 Eliz. C. B. Huish v. Philips.

Cro. J. 13. pl. 17. Pasch. 1 Jac. B. R. PHILLIPS v. HUGHES, S. C. and judgment affirmed.

18. In second deliverance the case was, that J. being lessee for years 9 Eliz. assigned his estate to A. the plaintiff. The defendant pleaded that before the grant to A. viz. 8 Eliz. T. assigned his estate to the defendant, without traversing the grant to the plaintiff. Williams said, there needs no traverse; for being granted the 8 Eliz. it is impossible it should be granted 9 Eliz. and cited 2 Ed. 6. and one H. 5. But Anderson held that he ought to traverse; for it is impossible to confess and avoid a grant by confession that was granted to another before; for if it were so, the 2d grant is void, and being confessed, here ought to be a traverse. Walmesley contra; but Glanvill and Kingsmill held, that there must be a traverse; for there ought to be a confession before there can be an avoidance, but here he does not confess the grant, but pleads matter that denies its being granted. And at last Anderson gave judgment that he ought to traverse. Ow. 142. 44 Eliz. in C. B. Ayer v. Joyner,

19. The

19. The plea of the defendant ought either to confess and avoid, or traverse the material point in the declaration; and confession is only where the plaintiff and defendant agree in one and the same thing; and where they vary in estate in the quantity of it, there ought to be a traverse. Yelv. 140. in case of Ewer v. Moile.

As if the plaintiff entitles himself to a fee so long as J. S. has issue, and the de-

fendant would derive an estate so long as J. D. has issue, he must take a traverse; for though they agree in the nature of the estate, yet they vary in the substance by reason of the different limitations. Yelv. 140, 141. Mich. 6 Jac. B. R. in case of Ewer v. Moile.

So if the plaintiff in writ declares of an estate to him and his heirs males, and the defendant derives estate to the plaintiff and his heirs female, &c: this is not good without traversing the estate surmised by the plaintiff. Yelv. 141. in case of Ewer v. Moile.

20. In all actions where the plaintiff makes a title to the thing in demand, or to a thing for which he demands damages, there the defendant ought to make a better title to himself, and to traverse the plaintiff's title, or otherwise to confess and avoid it. Arg. quod fuit concessum per tot. Cur. Yelv. 174. Hill. 7 Jac. B. R. in case of Priestly v. White.

21. When a man justifies all the fact, there needs no traverse: Mo. 864. pl. 1192. Hill. 13 Jac. Weaver v. Ward.

22. He who pleads in the negative, shall never take a traverse; for he must only maintain his bar; per Jones and Whitlock. Palm. 511. Hill. 3 Car. B. R. Farrer v. Gate.

23. Where any thing pleaded is directly contrary to the matter in the declaration, such plea is not good without a traverse, but it is in the election of the other party to pass by it, or to demur upon it; per Twissden J. who said that this seemed to be a rule as to traverses. Sid. 301. Mich. 18 Car. 2. B. R. in case of Courtney v. Phelps.

24. North Ch. J. said, he had always taken the law to be, that when you come to the replication, the omitting of a traverse where it ought to be taken, was matter of substance; for if they should not be bound to traverse, they might plead on ad infinitum. And he said so he had often seen it ruled in B. R. that hoc paratus est verificare, instead of hoc petit quod inquiratur per patriam, or de hoc ponit se super patriam, was matter of substance. Freem. Rep. 203. pl. 205. Mich. 1675. in case of Snow v. Sir Wm. Wiseman.

2 Mod. 60. Mich. 27 Car. 2. C. B. S. C. accordingly.

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25. In replevin, the defendant made consuance as bailiff to Sir P. W. setting forth, that he was seised in fee of the place where, &c. and so justifies the taking damage-feasant; the plaintiff replies and confesses the seisin of Sir P. W. but pleads that Sir G. W. his father was seised, &c. in fee, and made a lease to W. R. for 3 lives of the place where, &c. that W. R. was dead, and that W. W. entered as occupant, and made a lease to the plaintiff. The defendant demurred, for that the plaintiff had not traversed the seisin in fee of Sir P. W. the son. It was held per Curiam, that either in trespass or in avowry, if a freehold is pleaded it must be traversed, unless the party does wholly confess and avoid it by a defeasible title, only with this difference, that if in action of trespass a freehold is pleaded, the party may traverse it generally, without inducing his traverse by a title; but in avowry, the traverse must

3 Mod. 318. Mich. 2 W. & M. in B. R. S. C. by the name of Bradburn v. Kennerdale argued, but no judgment was given. — Carth. 164. S. C. that in Hill. term following it was adjudged by the Court, that the bar was ill for want

of a tra-
verse; that
the place
where was
parcel of the
manor tem-
pore captio-
nis; for
though it
was granted
that the reversion of the locus in quo remained parcel of the manor after the demise for three lives; yet the place itself and the freehold were severed by the demise, and by consequence they were not parcel of the manor tempore quo, &c. therefore the plaintiff ought to have traversed that which the defendant had affirmed (viz.) that the locus in quo was parcel of the manor of A. tempore quo, &c. And as to this matter there is a difference between replevin and trespass; and the Court held that the seisin in dominico of the place where, &c. was not traversable; for it is not expressly alleged in the confession, that Sir P. &c. was seised in dominico of the place where, but only by consequence as it was parcel of the manor of Asley; of which he (Sir P. W.) was seised in dominico; therefore if he had traversed the seisin, it must have been of all the manor. The judgment was affirmed.

26. The default of a necessary traverse is substance, and not aided by a general demurrer, Carth. 166. Mich. 2 W. & M. B. R. in case of Bradburn v. Kennerdale.

385 (N. 1). (Q. a) Necessary in what Case, where there is a Confessing and Avoiding.

1. WHERE the matter is confessed and avoided it need not be traversed. 3 Salk. 353. pl. 4. Pasch. 9 W. 3. Anon.

But where
seoffment is
pleaded sim-
ply it is suf-
ficient for
the other to
say that it
was upon
condition,

2. In annuity the plaintiff declared upon prescription; the defendant said that it was granted upon condition, which is broken on the part of the plaintiff; and no plea per Cur. without traversing the annuity by prescription; for annuity by prescription, and annuity by grant upon condition, cannot be extended to one and the same annuity. Br. Confess and Avoid, pl. 63. cites 32 H. 6. 4.

&c. without traversing, &c. for it may be intended one and the same seoffment; note the diversity. Br. Confess and Avoid, pl. 63. cites 32 H. 6. 4.

As in tres-
pass the de-
fendant jus-
tified for com-
mon append-

3. Where the plaintiff confessed as much as the defendant alleges and more, he need not traverse. Br. Traverse per, &c. pl. 143. cites 37 H. 6. 34.

ant to his house in D. and 40 acres of land in the place where, &c. the plaintiff said that he had no common there, but during the time he dwelt in the said house, and he did not dwell there at the time of the trespass, absque hoc that he had common there in other manner. Per Choke, where the plaintiff confesses all that which the defendant has said and more, he need not traverse; but per Pilsot he ought to traverse; for he does not confess all that the defendant has said, for he claimed common there at all times; and the plaintiff said, that he had not common there, but when he dwelt in the house to which, &c. by which he traversed the common modo & forma, &c. Br. Confess and Avoid, pl. 22. cites 37 H. 6. 36.

For in assise if the tenant pleads seoffment of the father of the plaintiff with warranty; and the plaintiff says, that it was upon condition, &c. and that he entered as heir for the condition broken, he need not traverse, &c. for he has confessed all that the tenant said and more, which surplus avoids the bar of the tenant. Per Choke. Br. Confess and Avoid, pl. 22. cites 37 H. 6. 36. — S. P. ibid. pl. 38. cites 6 H. 7. 5. per Hussey, Fairfax, and Wood, — S. P. Br. Traverse per, &c. pl. 187. cites 6 H. 7. 5. per Wood. — Heath's Max 111. cap. 5. cites S. C.

So elsewhere, if the one alleges dying seised, and the other alleges devise of him who died seised; which ground was admitted there for law. Br. Confess and Avoid, pl. 22. cites 37 H. 6. 36.

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4. In trespass the defendant said that R. H. was seised in fee, and infeoffed 2, who infeoffed 3, who infeoffed 5, and one died, and the 4 infeoffed the defendant, and gave colour to the plaintiff, and the plaintiff said, that before R. H. any thing bad, J. H. was seised in fee, till by the said R. H. disseised, who occupied at will, which R. H. infeoffed the 2, who infeoffed the 3, who infeoffed the 5 and 4 others, by which they were seised, and shewed how the defendant came to the possession by them, and he re-entered, and was seised till the defendant did the trespass, and the defendant rejoined that R. H. did not disseise J. H. And a good plea, and need not to traverse that the 3 did not infeoff the 9, but the 5 only; for he confesses all that the defendant said and more; quod nota. Br. Confess and Avoid, pl. 43. cites 3 E. 4. 17.

Br. Traverse
per, &c. pl.
214. cites
S. C.

5. Where one justifies by a lease from J. S. and the plaintiff says, that the said J. S. infeoffed him before, and after the feoffment entered and disseised him and made the lease, and afterwards re-entered. This is good without traverse; for thereby he confesses and avoids the lease alleged, per Cur. Cro. E. 754. pl. 17. Pasch. 42 Eliz. C. B. in Covert's case.

6. In replevin the defendant avowed for that W. R. was seised and made a lease to him (the defendant) for one year, and so justified the taking, &c. damage feasant. The plaintiff replied, that true it is, that W. R. was seised, &c. but before he made a lease to the defendant he made another to the plaintiff, which is still in being, and not determined; this is sufficient without a traverse, because the title of the defendant is confessed and avoided. 3 Salk. 353. pl. 4. Pasch. 9 W. 3. B. R. Anon.

For a confessing and avoiding is a full answer of the matter alleged, and so there needs no traverse of it, or denial

of the thing. L. P. R. tit. Traverse, cites Pasch. 24 Car. B. R.

(R. a) Good or not. Where there is a Confessing and Avoiding.

See (W) pl. 2.

1. **WHERE** the plea is fully confessed and avoided, and then a traverse moreover is taken; this traverse vitiates the whole plea. Ld. Raym. Rep. 238. Trin. 9 W. 3. in case of Lambert v. Cook, cites Brook, Confess and Avoid, 65. 33 H. 6. 28.

For by that means the party denies what he had before confessed. Jenk. 105. pl. 1.

2. In ejectment the defendant pleaded in bar that the dean, &c. of Windsor were seised, and made a lease for years to W. R. who assigned it to the defendant, who was possessed till the lessor of the plaintiff ousted him and disseised the dean, &c. and being so seised made a lease to the plaintiff, upon whom the defendant re-entered; the plaintiff replied, and confessed the seisin of the dean, &c. and made title to the term by the assignment made by the lessee to his own lessor before the assignment made to the defendant, and traversed the disseisin. The Court held clearly that the traverse was ill, because the plaintiff had confessed and avoided, and also traversed, whereas he should have left the matter upon the assignment of the term without any traverse, so as the defendant might have traversed the assignment in his rejoinder, which is the only material point in variance; for if the first assignment was made to the defendant it was a disseisin, but if

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if to the lessor of the plaintiff it was no disseisin. So that the point was upon the priority of the assignment, and ought to be in issue. Mo. 557. pl. 757. Trin. 40 Eliz. Townsend v. Kingsmill.

Brownl. 144.

S. C. accordingly; and adds, that if the plaintiff had intended to have fully answered the defendant, he ought to have taken his traverse in the very same words the defendant had pleaded it against him, viz. absque hoc that she did enter, and was

3. In *ejectment* upon a lease made by E. J. the defendant *pleaded that before the said E. had any thing one M. J. was seised in fee and had issue H. to whom the lands descended after his death, and that the said E. entered, and was seised by abatement, and died; the plaintiff replied, and confessed the seisin of M. and that he devised the lands to E. in fee, and so claimed under the devise, and traversed that she was seised by abatement modo & forma.* And upon demurrer it was adjudged for the defendant; for the plaintiff need not both to confess and avoid and also to traverse the abatement; for the plaintiff made title under E. the devisee of M. and so her entry legal and not by abatement, and so *the traverse over makes the replication vitious*; for no traverse should be taken but where the thing traversed is issuable; and the devise here is only the title issuable. Besides the traverse was not good as to the manner of it; for he should not have traversed absque hoc that E. was seised by abatement. But it should have been absque hoc that she did abate, &c. Cro. J. 221. pl. 3. 7 Jac. B. R. Bedell v. Lull.

seised by abatement; quod nota. — S. C. Yelv. 151. accordingly.

4. In *trespass* for trespass done in an acre parcel of the manor of D. the defendant *pleaded that R. was seised of the manor and the acre escheated to him, who conveyed the manor of which the acre is parcel, after the escheat by mesne conveyance to A. in fee, and that A. 12 Eliz. infeoffed B. of the said manor of which the said acre is parcel, and so justified by conveyance from B. to the defendant; the plaintiff replied that 10 Eliz. R. infeoffed C. of the said acre, absque hoc that he infeoffed B. of the said manor of which the said acre is parcel.* The defendant demurred generally. It was argued that the traverse was good, and alleged 38 H. 6. 49. the same traverse, and that here when the defendant had pleaded that the acre had escheated and alleged a feoffment of the acre, the plaintiff may traverse that which is not expressly alleged, and cited 34 H. 6. 15. But Hobart Ch. J. said that the traverse is not good; for by the feoffment made 12 Eliz. he had confessed and avoided the feoffment made the 10 Eliz. and so there needed no traverse. Adjournatur. Het. 37, 38. Mich. 20 Jac. C. B. Johnson v. Norway.

Jo. 66.

pl. 3. S. C. accordingly.

5. Debt upon bond dated 30 Novemb. 20 Jac. to perform an award, so as it be made before the first day of June; the defendant by his plea confessed the bond dated 30 Novemb. but said it was *primo deliberat* 28 Aprilis 21 Jac. after which day, and before the 1st day of June following, there was no award made, *absque hoc quod cognovit se teneri modo & forma, &c.* It was held that the traverse was repugnant; for he had confessed the bond, but denied it by the traverse; for by Doderidge J. the traverse absque hoc goes to the deed itself. Lat. 59. 61. Pasch. 1 Car. The Bishop of Norwich v. Cornwallis.

(S. a) Good or not. Where the Party may wage his Law. See (S) pl. 5.

1. **WHERE** a man may wage his law, there he cannot traverse the cause of the debt nor the contract. Br. Traverse per, &c. pl. 64. cites 8 H. 6. 5. Br. Dettie, pl. 88. cites S. C. — S. P. Keilw. 39. pl. 4. cites 13 H. 7. Anon.

2. As in debt upon * buying and † lending or the like, he shall not say that he did not buy nor did not borrow, but shall plead that he owes him nothing or wage his law. Br. Traverse per, &c. pl. 64. cites 8 H. 6. 5. Br. Dettie, pl. 88. cites 8 H. 6. 5. — S. P. Because he may wage his law. Keilw. 39. pl. 4. Trin. 13 H. 7. Anon.

† In debt against an abbot of 20l. and counted that the predecessor borrowed the money of him, which came to the use of the house, that is to say, in reparations, &c. per Choke, it is sufficient to shew generally how it came to the use of the house. and not how it was laid out; and the defendant said that he did not borrow, and a good issue notwithstanding that by some he may wage his law. Br. Traverse per, &c. pl. 245. cites 13 E. 4. 4.

3. So in debt upon arbitrement, the defendant shall not plead no such submission; for he may wage his law, and there he cannot traverse the cause of the debt, nor contract. Br. Traverse per, &c. pl. 64. cites 8 H. 6. 5. S. P. Br. Ibid. pl. 275. cites 22 E. 4. 29. Per tot. Cur. except Brian. —

But Br. Traverse per, &c. pl. 245. cites 13 E. 4. 4. it was said that in debt upon arbitrement, he may traverse the arbitrement, or wage his law. — S. P. Br. Ibid. pl. 264. cites 21 E. 4. 55. that he may say no such arbitrement, and yet he may wage his law. Brooke says quare inde. — S. P. Because this arbitrement lies in notice of a 3d person, and so the lay people may have consance of it, and for this cause the plea has been held good. Keilw. 39. pl. 4. Trin. 13 H. 7. Anon.

4. Contra in debt upon a † lease for years, or upon § arrears of account before auditors, there he cannot wage his law; therefore there non dimisit, &c. or nul tiel account is a good plea. Br. Traverse per, &c. pl. 64. cites 8 H. 6. 5. † S. P. Br. Traverse per, &c. pl. 228. cites 8 E. 4. 3. that he may traverse the lease. — § Br. Traverse per, &c. pl. 264. cites 21 E. 4. 55. that he may say nul tiel account, and yet may wage his law. Brook says, quare inde.

5. In detinue of charters, the defendant may traverse the bailment, because he cannot wage his law. Br. Traverse per, &c. pl. 228. cites 8 E. 4. 3. S. P. Br. Traverse, per, &c. pl. 264. cites 21 E. 4. 55. —

But in detinue of a chest sealed with charters, the defendant said that it is a box sealed with charters which the prior predecessor of the plaintiff delivered to the defendant, in pledge for 100s. borrowed, which he took to re-deliver when the 100s shall be paid, absque hoc that he detained such chest of charters; and a good plea, and yet he might have wages his law, because he did not count of any charters special. Br. Traverse per, &c. pl. 272. cites 22 E. 4. 7.

6. But where he may wage his law, there he shall not traverse the bailment; by all the Justices. Br. Traverse per, &c. pl. 228. cites 8 E. 4. 3. As in detinue of bailment of a horse to re-bail when,

&c. the defendant said that he bailed to him to bail to a stranger, which he has done, absque hoc that it was bailed to him to re-bail, prout, &c. And per tot. Cur. it is no plea, because he may wage his law, and so shall not traverse the bailment. Br. Traverse per, &c. pl. 264. cites 21 E. 4. 55.

So in detinue of goods, and counted of bailment, the defendant said that the same day, &c. and at another time the plaintiff gave to the defendant the same goods, absque hoc that he bailed them to the defendant prout, &c. And per tot. Cur. except Brian, it is no plea; for it is only argument; and also when the defendant may wage his law, as here, he shall not be suffered to traverse the mesne conveyance, and in debt upon buying of a horse, that he did not buy is no plea; for it is only nihil debet argumentatively. Br. Traverse per, &c. pl. 275. cites 22 E. 4. 29.

Sec (D. b). (T. a) Good or necessary. *Where the Writ or Count is of more or less than it ought to be.*

† S. P. Per
Prifot and
Danby; and
the best opi-
nion Br.
Traverse
per, &c. pl.
33. cites 35
H. 6. 38.

1. UPON the enterpleading in detinue of goods, the one said that they were delivered upon condition to stand to the arbitrement of W. P. who awarded that he should do such an act, which he has done, and that the other infroffed him, which he has not done, and prayed livery; and the other said that he awarded this, and that the other should be bound to him in 100l. which he has not done, absque hoc that he awarded as above. Per Ascough, where a man alleges an award where the award was † of this, and more, there the other shall say that he awarded this and such another thing, absque hoc that he awarded this only. And per Newton, where a man pleads award of 3 things, and that the defendant has done 2 of them, and not the 3d, where in fact the award was but of 2 things, there the other may say that he awarded the 2 things which he has performed, absque hoc that he awarded the third; and there it is sufficient for the other to maintain that he awarded the third thing. Br. Traverse per, &c. pl. 68. cites 19 H. 6. 3. 19.

† Orig. is
(tenant) in
all the edi-
tions, but it
seems it
should be
(tenantum).

2. Detinue of two bonds, the garnishee pleaded arbitrement made between the plaintiff and him, that the plaintiff should make partition of the manor of B. and of 100 acres of land in C. and pay to the garnishee 10l. and said that the plaintiff had not made the partition nor paid the 10l. the plaintiff said that they awarded as above, and also that the garnishee should deliver to him a deed of annuity, &c. absque hoc that they awarded as above only. And per Paston, the † only cannot make issue. Br. Traverse per, &c. pl. 88. cites 21 H. 6. 18.

3. By which the plaintiff said that the award was, that he should make partition of the manor by itself, and of the land by itself, absque hoc that they awarded that the partition should be made of the manor and land altogether prout, &c. and so ad patriam; and it was said that there 19. the (only) was not suffered to make issue also; quod miror; therefore see. Br. Traverse per, &c. pl. 88. cites 21 H. 6. 18, 19.

4. In debt of 4l. the plaintiff counted of a lease of 20 acres of land, rendering 4l. per ann. and the defendant said that he leased the 20 acres, and 12 other acres for the same term, rendering the 4l. per ann. Judgment of the count; and the best opinion was that he ought to traverse, absque hoc that he leased the 20 acres only prout, &c. Br. Traverse per, &c. pl. 381. cites 32 H. 6. 3.

S. C. cited
Le. 44. pl.
56. Arg. in
the case of

5. Debt upon a lease of 4 acres of land for 4l. rent, the defendant demanded judgment of the count, because the plaintiff leased the acres, and a rectory, and 10s. rent, and view of frank-pledge, for the same sum,

him, and did not traverse absque hoc that he leased the land only for this rent. And the best opinion was, that he ought to traverse ; for the lease of the 4 acres is not a lease of the rectory and residue. Br. Traverse per, &c. pl. 33. cites 35 H. 6. 38.

KEMPTON
V. BELLAM-
MY. Mich.
28 & 29
Eliz. C. B.
and the

Court clear of opinion, that for want of such traverse the plea is not good.

6. But in debt upon a lease, it is a good plea to the writ, without traversing that the plaintiff and another leased who is alive, or that the lease was made to the defendant, and another who is alive ; for there * every one leases the entire, and the entire is leased to every one. Br. Traverse per, &c. pl. 33. cites 35 H. 6. 38.

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So in debt for
the arrears of
rent of 14
acres leased,
&c. the de-
fendant to 4

acres said that he lessa pas, and to the 10 acres that he leased to him and his feme who is alive not named, judgment of the writ ; and by the opinion of the Court he shall say that he leased the 10 acres, absque hoc that he leased the 14 acres, prout, &c. Br. Traverse per, &c. pl. 249. cites 17 E. 4. 7.

7. So of selling a horse by 2, or to 2, and the action is brought by one, or against one. Note the diversity. Br. Traverse per, &c. pl. 33. cites 35 H. 6. 38.

8. Avowry by tenure of 2 acres by 12s. The plaintiff said he held those 2, and 2 others by 10s. absque hoc that he held the 2 by 12s. Per Keble, this is pregnant, but may take the quantity of the services by protestation, and traverse the tenure of the 2 acres only ; but if he will speak to the quantity of the services, he shall traverse the seisin ; & adjournatur. Br. Traverse per, &c. pl. 310. cites 8 H. 7. 5.

Br. Avowry,
pl. 87. cites
S. C. —
Br. Double,
pl. 93. cites
S. C. —
Brian said
that the
plaintiff
could not

plead otherwise ; for there is no reason that for the false avowry the plaintiff should be at any mischief, but he ought to have an answer to it then, and then if he was never seised of more than 10s. and he alleges 12s. he cannot traverse the tenure, absque hoc that he holds by 12s. and as to the 2s. residue ne unques seise, because then he ought to agree with him in the quantity of the land, which here he does not ; but Keble contra, as here, Mich. 8 H. 7. 5. pl. 1.

9. If White-acre and Black-acre be adjoining, and are holden the one of J. S. and the other of J. D. and J. S. distrains and avows for both acres, he may well traverse the tenure ; per Periam J. Godb. 24. in case of Throgmorton v. Terringham.

(U. a) Not good, by its not answering the Point of the Writ, or being only to Part. See (M) pl. 2.

1. IN account against guardian in socage, it is no plea that the ancestor held of him in chivalry, by which he seised the ward, unless he traverses absque hoc that he held of him in socage, prout, &c. quod nota ; for he shall answer the point of the writ. Br. Traverse per, &c. pl. 373. (bis) cites 10 H. 6. 7.

2. In case for stopping 3 lights totaliter, the defendant justified the stopping 2 lights and part of the 3d, and traversed that he stopped the 3 lights aliter, vel alio modo. Williams J. said this was no answer to the declaration, but should have said guilty or not guilty, as to the residue, and not have traversed at all, and the absque hoc goes to the 2 lights, and as to the 3d it is no answer ; and

and thereupon the Court gave judgment for the plaintiff. 2 Bulst. 116, 117. Pasch. 9 Jac. Newall v. Barnard.

3. If a traverse is *too narrow* and short of the matter traversable, this is *substance*. Carth. 166. Mich. 2 W. and M. in B. R. in case of Bradburn v. Kennerdale.

(W. a) Of an immaterial Traverse.

S. P. Ibid.
pl. 92. cites
21 H. 6. 35.

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1. **W**HERE the plea, or matter of the plea, is not sufficient, there the fans ceo shall not aid it, though the fans ceo or traverse be good. Br. Traverse per, &c. pl. 132. cites 9 E. 4. 40.

2. In trespass the defendant said, that J. Long, and Alice his feme, were seised in fee jointly, and J. survived Alice, and died by pro-
testation seised, and conveyed to the defendant as heir by descent, and gave colour. And the plaintiff said, that before the said J. any thing had, the said Alice was seised in fee, and took J. to baron, by which he was seised in right of the said A. and after they granted the said tenement to two by fine, who re-infeoffed the said J. and A. and to the heirs of the said A. and the plaintiff conveyed to him as heir of A. Absque hoc, that the said J. was seised in fee; and so to issue, and found for the plaintiff. Per Brian, the traverse is void; for if J. was seised in fee or not, yet by the fine, which is confessed by both, his interest in fee was determined, so he ought to have traversed, that J. was not seised in fee after the fine; quod Prisot concessit, that the traverse is void for the cause aforesaid; but Catesby contra. Br. Traverse per, &c. pl. 271. cites 21 E. 4. 83.

3. In replevin the defendant avowed the taking damage feasant. The plaintiff replied, that J. S. made a lease to him, by which he entered, and put in his cattle. The defendant rejoined, that before the lease made to the plaintiff, J. S. made a feoffment to him. The plaintiff maintained the lease, absque hoc that J. S. seistus feoffavit. It was held, per tot. Cur. that the word seistus is idle, and ought to have been left out; for a man cannot make feoffment, unless he is seised. Godb. 111. pl. 132. Mich. 28 and 29 Eliz. Hales v. Home.

4. In replevin, &c. the defendant avowed, &c. and the plaintiff replied in bar, that the prior and convent of N. were seised in fee, and so conveyed a title to himself by a lease, &c. The plaintiff [defendant] rejoined, absque hoc that the prior and convent were seised in their demesne as of fee, &c. Upon a demurrer the judges agreed, that this traverse was good, notwithstanding it was laid a thing impossible, (viz.) that the prior and convent can be seised of land, whereas the monks are dead persons in law, and therefore can have no seisin, but the prior alone; the monks being in consideration law of as dead persons, and therefore it shall be taken as if it had been pleaded, that the prior was seised, without mentioning the convent; so that the traverse is good, and the word convent surplusage. And. 268. pl. 276. Trin. 32 Eliz. Eden v. Downing.

5. In debt upon an obligation, where the condition was, that one Lea should be his true prisoner, and pay every month for his diet,
and

and the fees due to the plaintiff, by reason of his office; the defendant pleads the statute of 23 H. 8. and that this obligation was made for the ease and favour of the prisoner by colour of his office. And the plaintiff replied, that the Fleet is an ancient prison, and that time out of mind, &c. they used to take such obligations, absque hoc that this obligation was made for the ease and favour, contrary to the statute; upon which the defendant demurred generally. But Athowe prayed judgment, for that the traverse waives the matter before, which was but an inducement. And in 23 H. 6. there is an exception of the warden of the Fleet, and the warden of the palace of Westminster, that they might take such obligations which they used; to which the Court agreed. And for that the traverse over destroys the bar, the defendant ought to have joined in that; upon which judgment was given for the plaintiff, if, &c. Het. 146. Mich. 5 Car. C. B. Harris v. Lea.

6. Where a traverse is immaterial, unless there be a special demurrer to it with the causes shewn, it shall not vitiate the pleadings; but it is naught upon a special demurrer. 2 L. P. R. 588. tit. Traverse, cites Mich. 6 W. and M.

7. Replevin. The defendant avowed damage feasant in his freehold. The plaintiff in bar replied, that B. was rite & legitime such a day seised in fee of the manor of W. whereof the place is, and time out of mind has been parcel, and lays a custom for the copyholders to have common in the place where; and then sets out a grant of a copyhold tenement, &c. * to himself from B. &c. The defendant rejoined that the cattle were damage feasant in his freehold, absque hoc that B. at the day in the bar mentioned was rite & legitime seised in fee of the manor, and granted the copyhold estate to the plaintiff, &c. The plaintiff demurred. Exception was taken first, that the defendant ought not to have traversed the rite & legitime; nor, 2dly, the day of the seisin, because if the lord were a disposer [disseisor] the grant would be good; and the time of the seisin is not material, if it were before the grant. Judgment was given for the plaintiff. 2 Ld. Raym. Rep. 902. Trin. 2 Ann. Helliot v. Selby.

8. Declaration in prohibition, that defendants in error were elected common-council-men, that the plaintiffs (defendants in error) intending to draw their election into question, exhibited a petition to the common-council-men with design to remove them; whereas the said common-council have no power to examine concerning such elections; for that time out of mind such election belonged to the court of mayor and aldermen. Defendants by their plea affirm, that the common-council, time out of mind have had, and ought to have, jurisdiction to examine into such elections; and aver, that the court of mayor and aldermen have not such jurisdiction. Plaintiffs reply, that the common-council have not such jurisdiction. Defendants demur. The traverse is immaterial, and the issue ought to have been joined upon the jurisdiction of the common-council; for though the mayor and aldermen should have no jurisdiction, it does not follow, that the common-council have. MS. Tab. 1718. Belton and Bridger v. Jeffes.

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2 Salk. 701.
S. C. but
S. P. does
not appear.
— 3 Salk.
355. pl. 9.
S. C. ac-
cordingly;
only there
the day of
the grant is
expressly
mentioned,
and says,
that the day
of granting
it is not ma-
terial; for a
grant at one
day is a
grant at any
day.

9. Where

9. Where in trespass there is a *good justification*, a traverse of the time when the trespass was done, would be wholly immaterial. 8 Mod. 31. Hill. 7 Geo. 1721. Carvell v. Manly.

(X. a) *How. General or Special. And where it amounts only to the General Issue.*

1. **W**HERE the defendant justifies to take a vagrant for suspicion, the plaintiff may say, that *de son tort demesne absque tali causa*, but shall not say *de son tort demesne, absque hoc* that he was a vagrant; for he shall not traverse the special matter, but where it is matter of record, or of writing, and not where it is matter in fact. Br. De son Tort demesne, pl. 20. cites 2 E. 4. 9.

2. Where the matter in the declaration and in the replication is of one and the same nature, the defendant shall take the general traverse; per Choke. Br. Trespass, pl. 359. cites 21 E. 4. 75, 76.

And as to the plea of taking and driving the beasts, the plaintiff prescribed for common; and said, that immediately after the defendant pounded his cattle, he required him to deliver them to him, which the

3. Trespass for entering his close, and spoiling his grass, &c. and taking and driving his beasts to places unknown. The defendant pleaded, that the place where, &c. is a waste, parcel of his manor, and the plaintiff's beasts were there mixed with the beasts of strangers, who had no right there; and because he could not separate the one from the other, he drove them all together to a pound in the waste to part them, and then drove the stranger's beasts out of the waste, and left the plaintiff's in it. The plaintiff replied; and as to the plea of entering into his close demurred, because it amounted only to the general issue. But it was resolved, that the bar being intire, though such plea be only the general issue, as being his own act, yet being joined with the special matter of justification in one intire plea, it is good. 3 Lev. 40, 41. Hill. 33 Car. 2. C. B. Thomas v. Nicols.

The defendant rejoined, and maintained his bar, *absque hoc* that *die & loco*, alleged by the plaintiff, he required the defendant to deliver them. Upon a demurrer the rejoinder was adjudged ill; besides it is multifarious, and he should have traversed one single point, and not all together. 3 Lev. 40. Thomas v. Nichols.

And as to the replication, it was adjudged ill; for the plaintiff should have traversed the bar, viz. either, first, That the defendant did not leave the beasts in the waste after severance; or, 2dly, That he might have severed them without pounding them; or, 3dly, *De injura sua propria absque tali causa*; and then the defendant in this issue must have proved the necessity of impounding them. 3 Lev. 40, 41. Thomas v. Nichols.

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4. In covenant for not keeping and employing his apprentice, the defendant pleaded, that, from such a time to such a time, he did keep and employ him; and that then he *servitium ipsius* (the defendant *deseruit & reliquit, & ab eo decessit & ulterius in servitio suo remanere neglexit & abinde postea hucusque; ad loca incognita seipsum elongavit & absentavit*. The plaintiff replied, and traversed, *absque hoc quod servitium* (of the defendant) *deseruit vel reliquit vel ab eo decessit, vel in servitio suo remanere* (omitting *neglexit*) *vel seipsum elongavit*. And upon a demurrer to this replication it was objected, that the traverse was multifarious, consisting of so many particulars in the disjunctive; and that by omitting the word (*neglexit*) it was not sense. Sed per Cur. the traverse is good; for it is pursuant to the defendant's plea, which may be traversed, as he has pleaded it;

it; and that part of it which is nonsense will not hurt, because the traverse is good without it. 3 Salk. 355. pl. 8. Pasch. 2 W. 3. B. R. Newdigate v. Selwin.

5. Every thing that is traversable *must be expressed in certainty*; and then if it be a good plea, and not traversable, it is not questionable. Skin. 486. in case of Philips v. Berry.

6. In replevin, the defendant *avowed for a rent charge in arrear*; the plaintiff *replied de injuria sua propria, absque hoc that rent was in arrear*; and upon a special demurrer, for that this replication and traverse amounted to no more than the general issue, the Court held that this is not a proper inducement to the traverse; the natural and proper plea to this avowry had been nihil in aretro, which is quasi the general issue; so that this is a pleading special matter, which amounts to the general issue, and no other evidence can be given but such as might have been given upon the proper issue; therefore this circumlocution is ill, because it *prolongs the cause*, by inforcing the avowant to an unnecessary replication; and though it is no more than matter of form, because it does not alter the evidence, yet per Holt Ch. Just. this being upon a special demurrer, is naught. 3 Salk. 356. pl. 11. Hill. 12 W. 3. B. R. Horn v. Lewin.

Ld. Raym. Rep. 639. 641. S. C. and held accordingly per tot. Cur. And though it be the same thing in effect with a plea of riens arrear, yet riens arrear is the proper plea in avowry, and is quasi the general issue; and though it be but form,

yet it is legal form, which the law will have to be followed. — 12 Mod. 254. S. C. accordingly. — 2 Salk. 583. pl. 4. S. C. accordingly. — And in 3 Salk. 356. pl. 11. it is said to be as if in trespass a man should plead de injuria sua propria, absque hoc quod est culpabilis, so de injuria sua propria, absque hoc quod he is bailiff, & de injuria sua propria, absque hoc that there was such a prescription, these are naught.

7. *Justification on a public act of parliament* may be traversed generally. Ld. Raym. Rep. 700, 701. Mich. 13 W. 3. Chauncey v. Winde & al.

12 Mod. 580. S. C. and in arguing the case it was

agreed, that when the plea consists of a justification, part depending of matter of record, the replication ought to be with a special traverse. Agreed Arg. 12 Mod. 581. in case of Chancey v. Win & al.

But it was said that this rule has its exceptions; for if matter of record be made use of by way of inducement to the part of justification, there it is not necessary to reply specially, and cited 2 Le. 102. and that that general rule only holds place where such matter of record is pleaded, to which the plaintiff may have an answer, as to a scire facias, &c. but here there can be no answer to a justification under an act of parliament, as in the principal case. And he likewise agreed, that where one claims common by prescription, rent by grant, goods by sale, &c. and so justifies as having interest, there the plaintiff must answer directly to the title, and not with a general de injuria sua propria absque tali causa. But when one intitles himself by act of parliament, especially a general act, which none can traverse, there he may well reply de injuria sua propria absque tali causa. And by Holt Ch. J. the act of parliament here, if it had not been pleaded, would have been taken notice of by the Court; therefore its being pleaded being superfluous, will be no hindrance to the replication, with this general traverse. 12 Mod. 581, 582. Mich. 13 W. 3. in case of Chancey v. Win & al.

(Y. a) How, as to Time, Where it must be of the [394]
Time before, or of the Time before and after, or of the Time after.

1. **I**N assise, the tenant intitled himself, because W. was seised in fee, and made recognizance to the defendant in 40l. by statute merchant, and he sued execution, and shewed the record certain, &c.

The plaintiff said that *W.* two years before the statute infeoffed the plaintiff, which estate he continued till by the defendant disseised, absque hoc that *W.* the day of the statute, or ever after, any thing had, prist; and the other that he was seised the day of the statute, but was not suffered to say the day of statute, and after; for it is double on the part of the tenant, and yet well for the plaintiff. Br. Traverse per, &c. pl. 170. cites 24 Ass. 2.

And by some, the defendant shall shew what hour of the day he was infeoffed, and that he took them the same day after; for if he took them in the morn-

2. Trespass of goods taken; the defendant said that *J. B.* was seised of a house there in fee; and where the plaintiff declares the 2d day of May anno 5 E. 4. he infeoffed the defendant the 14th May in the year aforesaid, and the same day the defendant found the goods there damage feasant, by which he took them, absque hoc that he is guilty before the said 14th day of May; and it was challenged because he did not traverse before and after, and so was the opinion of 2 or 3 justices, and the best opinion. Br. Traverse per, &c. pl. 199. cites 5 H. 4. 124.

ing, and was not infeoffed till the noon of the same day, he cannot justify before the noon. Br. Traverse per, &c. pl. 199. cites 5 H. 4. 124.

But by 9 E. 4. fol. 4. it is sufficient *prima facie*, without shewing the hour, by which he pleaded the feoffment above at 6 in the morning, by which he took them there after on the same day damage feasant, absque hoc that he was guilty before or after the 14th day, &c. Br. Traverse per, &c. pl. 199.

In trespass, the plaintiff declared that the defendant 1st May 28 Eliz. cut down 6 posts of the house of the plaintiff at D. The defendant justifies, because the freehold of the house 10 April 27 Eliz. was to *J. S.* and that he by his commandment the same day and year did the trespass, &c. The plaintiff demurred, because the defendant did not traverse, without that that he was guilty before or after. And the opinion of Wray was, that the traverse taken was well enough, because the freehold shall be intended to continue, &c. See 7 H. 7. 3. But all the other 3 justices were of a contrary opinion; but they all agreed that where the defendant does justify by reason of his freehold at the day supposed in the declaration, then the traverse (before) is good enough. And afterwards judgment was given against the defendant. 1 Le. 95. pl. 123. Hill. 30 Eliz. in B. R. Higham v. Reynolds. — Cro. E. 87. pl. 9. S. C. that the defendant traversed, absque hoc that he was guilty of any trespass before the 10th April 27 Eliz. but did not traverse the time after, &c. And the Court inclined, that when he pleads his freehold, it shall be intended to continue, except the contrary be shewn, and therefore need not traverse the time after; but they would advise; but afterwards it was adjudged for the plaintiff.

* S. P. Per Littleton, Pigot, and Nele J. And that it is a good replication that ne infeoffa pas. Br. Traverse per, &c. pl. 110. cites 15 E. 4. 23. — Heath's Max. 105. cap. 5. cites S. C.

3. Contra in trespass in the land the 2d day of May, and he pleads feoffment the 14th day of May, absque hoc that he is guilty before, this is sufficient in trespass of * clauso fracto, grafs fed, and the like; for the soil remains to him after the feoffment. Contra of taking of goods. Br. Traverse per, &c. pl. 199. cites 5 H. 4. 124.

† In such case he shall traverse before and after; for the justification does not serve but for this time only. Br. Traverse per, &c. pl. 144. cites 37 H. 6. 37.

4. Trespass of assault and battery done to *W. H.* his servant, anno 7 H. 6. at B. and of entering into the house of the plaintiff; the defendant said that writ of subpoena was delivered to him to serve upon the plaintiff, by which he served it anno 18 H. 6. and the plaintiff and his servants carried him to the house of the plaintiff in spite of his teeth, and detained him there for half a day, which is the same trespass, and to any trespass before this day not guilty; and to the battery of the servant, said that de son assault demesne anno 18, and to the trespass before this day not guilty; and by the reporter he may justify the trespass or maintain another day which the plaintiff does not count of without any traverse; and in † battery when he justifies at

at another day which the plaintiff does not count of, he shall plead not guilty to all before this day and after; *quare*. Br. Traverse per, &c. pl. 104. cites 22 H. 6. 49.

5. *Trespas anno 17, the defendant said that the place, &c. anno 18 was the franktenement of J. N. who leased to the defendant for 10 years, and as to any trespass before not guilty.* Br. Traverse per, &c. pl. 105. cites 22 H. 6. 49.

Where the defendant justified by a lease for years, he shall traverse

before, and not the trespass after; for it is lawful after by his lease. Br. Traverse per, &c. pl. 144. cites 37 H. 6. 37.

And it was said that though the lease be determined yet he need not to traverse after. Br. Traverse per, &c. pl. 144. cites 37 H. 6. 37.

But *ibid.* pl. 220. cites 5 E. 4. 5. it is said by Genney and Choke, that if the lease be determined he shall traverse before and after. — S. P. Heath's Max. 106. cap. 5. cites S. C.

But where the lease continues he shall not traverse the time before. Br. Traverse per, &c. pl. 220. cites 5 E. 4. 5.

6. So where he justifies another day after by descent from his father, &c. and to any trespass before not guilty; *quod nota*. Br. Traverse, per, &c. pl. 105. cites 22 H. 6. 49.

7. In trespass the defendant justified the taking of the cattle 3 days after the day of the trespass supposed by the declaration, by virtue of a precept of the sheriff to make replevin, *absque hoc* that he was guilty before the 3d day. Laken serjeant said, that he ought to traverse before and after, but Prisot said no, but before only, and not after; for the precept is an authority to him to make deliverance at any day after, and continues till deliverance be made. Br. Traverse per, &c. pl. 144. cites 37 H. 6. 37.

Br. Trespas, pl. 204. cites S. C. — So in trespass of taking his cow, the defendant justified by writ of the king as sheriff of the

county to attach the cow, by which he attached her such a day and took her with him, *absque hoc* that he is guilty before the writ directed to him and after the return of it. And the traverse admitted good; *quare*. Br. Traverse per, &c. pl. 189. cites 9 H. 7. 6. — Br. Trespas, pl. 283. cites S. C.

8. But where a man pleads release, he shall traverse all times after; for the release discharges that which was before. Br. Traverse per, &c. pl. 144. cites 37 H. 6. 37.

S. P. *Ibid.* pl. 104. cites 22 H. 6. 49. — S. P. *Ibid.* pl. 268.

cites 21 E. 4. 66. — S. P. *Ibid.* pl. 309. cites S. C. — In trespass the 4th of May, if the defendant pleads a release the 1st of May, he shall traverse all days after only. Br. Traverse per, &c. pl. 220. cites 5 E. 4. 5. — S. P. *Ibid.* pl. 242. cites 12 E. 4. 6. — S. P. per Periam J. Godb. 111. pl. 131. Mich. 28, 29 Eliz. C. B. Anon. — S. P. And the plaintiff may say *quod non est factum*, without maintaining his day, if he will; for if there be no such release, he shall be punished at any day; and so see that it shall not be traversed, per Cur. Br. Traverse per, &c. pl. 304. cites 10 E. 4. 2.

But in trespass laid to be done 1 Maii, the defendant pleads a release to him made 1 Junii, *absque hoc* that he was guilty at any time after the 1st of June. Coke Ch. J. said that the day of the trespass is not material, it should have been *absque hoc* that he was guilty before or after the 1st of June. And judgment for the plaintiff. 3 Bull. 209. Trin. 14 Jac. *Amson v. Walcott*.

9. So of arbitrement. Br. Traverse per, &c. pl. 144. cites 37 H. 6. 37.

S. P. Br. Traverse per, &c. pl. 242. cites 12 E. 4. 6.

10. In trespass of goods taken, the defendant said that the plaintiff was possessed, and sold to F. who let them remain with the plaintiff, and after F. sold to the defendant, and he took them, the plaintiff said that he was possessed till the day in the declaration when the defendant took them, *absque hoc* that he sold to F. before the said day, and the others *e contra*; for it is a good plea per Cur. and by this means the

plaintiff shall punish the trespasss done before the sale to F. Br. Traverse per, &c. pl. 302. cites 2 E. 4. 16.

† S. P.
Heath's
Max. 107.
cap. 5. be-
cause upon
that writ he
cannot be
guilty be-
fore, cites
S. C.—
And after
because he
might be

11. *Trespass de clauso fracto* 6 October, anno 1 E. 4. against the peace of the said king E. 4. the defendant said that 8 January 39 H. 6. the place was his franktenement, absque hoc that he was guilty after the said 8th day of January, and † well, though he did not say before and after, because * it is in the time of another king, and this writ is against the peace of the now king; so that if the jury find the defendant guilty in the time of Henry the 6th, he shall not recover by this writ. Contra if the writ had been against the peace of king Henry the 6th, and the now king; quod nota. Br. Traverse per, &c. pl. 212. cites 2 E. 4. 23, 24.

guilty after the day, in the time of H. 6. and in the time of E. 4. also he amended his traverse, and traversed that he was not guilty after the said day and time of E. 4. and then well; quod nota. Br. Traverse per, &c. pl. 212. cites 2 E. 4. 23, 24.

If he justifies before the day in the declaration, there he shall traverse the time after. Br. Traverse per, &c. pl. 220. cites 5 E. 4. 5.

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If he pleads
his frankte-
nement, there
the defend-
ant ought

12. But if he had said that his franktenement such a day in the time of E. 4. there he shall traverse before and after. Note the diversity. Br. Traverse per, &c. pl. 212. cites 2 E. 4. 23, 24.

to traverse all times after; for that excuses all times before. Br. Traverse per, &c. pl. 268. cites 21 E. 4. 66.

But where he says that it was his franktenement such a day, he shall traverse all the time before; and this seems to be where the day, that the plaintiff counts of, was before, and shall be intended his franktenement always after. Br. Ibid. — S. P. Br. Ibid. 309. cites S. C. and 12 E. 4. 6. — S. P. Br. Ibid. pl. 242. cites 12 E. 4. 6. — S. P. Br. Ibid. pl. 220. cites 5 E. 4. 5.

In trespass
of imprison-
ment the 2d
of May 4 E.
4. the de-
fendant jus-
tified the

13. False imprisonment; the defendant said that such a day after the day in the declaration, he arrested the plaintiff by warrant of the peace, and carried him to gaol, absque hoc that he is guilty before; and per Jenny and Choke, he ought to traverse before and after. Br. Traverse per, &c. pl. 220. cites 5 E. 4. 5.

4th of August in the 4th year aforesaid, by force of a warrant of the peace to him directed, to make the plaintiff find surety of the peace, which is the same imprisonment, absque hoc that the defendant is guilty of any imprisonment before this day; and it was doubted if he shall traverse all imprisonments before and after, and long debated, & adjournatur. Br. Traverse per, &c. pl. 191. cites 5 E. 4. 12.

Heath's
Max. 106.
cap. 5. cites
S. C.—
S. P. Br.
Traverse

14. In trespass the 2d of May, if the defendant pleads licence the 4th of May there he shall say absque hoc that he is guilty before or after; for licence does not continue, but extends only to the day in the licence. Br. Traverse per, &c. pl. 220. cites 5 E. 4. 5.

per, &c. pl. 309. cites 21 E. 4. 66. — S. P. and so if he justifies by assent of the plaintiff. Br. Traverse per, &c. pl. 268. cites 21 E. 4. 66.

So when a matter which amounts only to a licence is pleaded at another day than is mentioned in the declaration, the defendant ought to traverse both before and after. Sid. 294. pl. 13. Trin. 18 Car. B. R. in case of Dame Madicin, says it seems to be agreed.

15. *Trespass* was the 22d June 36 H. 6. the defendant said that J. N. was seised in fee, and infeoffed the defendant 3 May 37 H. 6. and gave colour by the feoffor anno 37 H. 6. absque hoc, that he is guilty before this day; and a good plea, though he claims by a stranger and not by the plaintiff, and gives colour by the stranger. Br. Traverse per, &c. pl. 195. cites 5 E. 4. 79.

16. Trespas of cutting his wood the first day of August, the defendant justified by prescription that the lords of the manor of D. have used to have 20 load of wood there yearly between Michaelmas and Christmas, and he being lord of D. cut the 20 October between Michaelmas and Christmas, absque hoc that he is guilty before Michaelmas and after Christmas: the plaintiff said, that he cut as in the declaration, and traversed the prescription of the 20 load modo & forma: And well per Cur. for where the defendant alleges title, the plaintiff shall not be compelled to maintain his day if the defendant has no such title; and so he has election to maintain his day or to traverse the title of the defendant, and so see traverse upon traverse. Br. Traverse per, &c. pl. 304. cites 10 E. 4. 2.

17. Trespas de clauso fracto in D. 6 July, the defendant justified [397] for tithes severed from the 9 parts as parson the 10th day of August, absque hoc that he is guilty unless after the tithes severed and till they were carried away; and it was held clearly that every parson may enter to collect his tithes and to turn them till they are dry, and of this the reasonable time shall be tried; and a good plea, and shall not be compelled to say that he is not guilty before nor after; for he is guilty every year after the tithes severed. Br. Traverse per, &c. pl. 242. cites 12 E. 4. 6.

18. So of common, from the time of the corn sown till they are re-sown; because those things are uncertain. Br. Traverse per, &c. pl. 242. cites 12 E. 4. 6.

But where a man ought to have common from Lammas. Per Choke.

mas to Candlemas, there he ought to traverse all times before Lammas and after Candlemas. Br. Traverse per, &c. pl. 242. cites 12 E. 4. 6.

19. Where a man justifies another day for rent arrear at Easter, he shall traverse that he is not guilty of any entry, but to distrain when the rent was arrear. Br. Traverse per, &c. pl. 242. cites 12 E. 4. 6.

20. Account as receiver, the defendant said that he accounted before the plaintiff himself for the same sum the first day of April, absque hoc that he was his receiver after. And no plea per Cur. for it does not go but for this time only, and not for the time before; or it may be that he received the like sum diverse times before, and so he ought to traverse before and after. Br. Traverse per, &c. pl. 309. cites 21 E. 4. 66.

But where the defendant justifies the same day that the plaintiff counts, there needs no traverse. Br. Ibid.—

S. P. Br. Ibid. pl. 242. cites 12 E. 4. 6.—Contra where he justifies at another day, as said elsewhere for clear law. Br. Ibid. pl. 309. cites 21 E. 4. 66.

21. In second deliverance the defendant said that A. leased to B. for 20 years, which B. granted his interest to the defendant, and so avowed damage-feasant; and the plaintiff said that such a day and year B. granted to him his interest, absque hoc that he granted his interest to the defendant before that he granted his interest to the plaintiff, and admitted for good. Br. Traverse per, &c. pl. 113. cites 14 H. 8. 17.

22. In a quare impedit the plaintiff declared that the defendant being parson of the church in question was presented to another benefice, and was inducted 15 April, by which the first became void,

&c. The defendant *pleaded*, that he was qualified 18 April, *absque hoc* that he was inducted 15 April. The Court was of opinion (*absente Anderson*) that the traverse was not good; for he ought to have said generally *absque hoc* that he was inducted before the day on which he had alleged he was qualified. Godb. 111. pl. 131. Mich. 28 & 29 Eliz. C. B. Anon.

(Z. a) How. Where the King is Party.

1. **A** Man was outlawed of felony, and aliened his land to J. N. by which *scire facias* issued against him, who came and would have traversed the felony; and the Court doubted if he might traverse it, by reason that he is a stranger to the record. But per Pigot 7 E. 4. 2. he cannot traverse it in case of felony, he being a stranger to the record; contra in case of trespass; by which it was prayed for the king that year, day, and waste be adjudged for the king immediately; and so it was immediately from that day till a year and a day next after; quod nota. Quære if the king may take the year and the day *what time he pleases*; it seems that he cannot. Br. Corone, pl. 205. cites 49 Aff. 2.

2. If A. be bound in a bond to 2, and after the one is *felo de se* and found by office, by which the king claims the entire bond, the other may traverse that he did not kill himself feloniously. Br. Traverse per, &c. pl. 229. cites 6 E. 4. 3. by the best opinion.

3. Where a man makes title or pleads a plea against the king, and takes a traverse *absque hoc*, &c. against the king, there the king may choose to maintain the matter of the *absque hoc*, or to traverse the title or plea of the other party, and not to maintain the *absque hoc*; contra of a common person. Br. Traverse per, &c. pl. 207. cites 3 H. 7. 3.

Keb. 920. pl. 24. S.C. says that the defendant rejoined that the ancestor of the plaintiff granted to J. S. and so conveyed under him to the defendant,

which the Court held a departure; but if the replication be ill, the plaintiff cannot have judgment. And Keeling agreed that the plaintiff ought to have traversed, but Twisden doubted; but it being a trivial action against 3 schoolboys, for playing in a court-yard near the school, where they had long used so to do, adjournatur.

4. In *trespass quare clausum fregit*, the defendant pleads that H. 8. was seised in fee, and so the lands descended to the king that now is, and that he as servant, &c. The plaintiff replies, that H. 8. granted to the plaintiff, and does not traverse the dying seised of king Cha. 1. and it might come to the king otherwise. Twisden J. said, a traverse needs not, and if it came to the king again, this ought to be shewn in the rejoinder; the last seisin shall be traversed if [for] it might be gained by disseisin. Adjourned. Raym. 137, 138. Trin. 17 Car. 2. B. R. Thatcher v. Ullocke.

(A. b) How, where both Parties claim by one and the same Person. See (S) pl. 13.—(1. a).

1. WHERE the plaintiff and defendant claim by one and the same person, there the traverse of the gift is good; per tot. Cur. Br. Traverse per, &c. pl. 278. cites 5 E. 4. 133.

2. In trespass if the defendant says that A. was seised in fee and infeoffed B. who infeoffed C. who infeoffed the defendant, and gives colour by A. There it is sufficient to say that A. was seised, and infeoffed the plaintiff, absque hoc that he infeoffed B. prout, &c. For now the plaintiff and defendant claim by one and the same person; and there it is sufficient to traverse the first feoffment. Br. Traverse per, &c. pl. 200. cites 5 E. 4. 133.

But if the colour had been given by C. who was the last, there to say that A. was seised, and infeoffed him, absque hoc

that he infeoffed B. is not a good replication, because they do not claim by one and the same person; but there he shall say that C. infeoffed him, absque hoc that he infeoffed the defendant. Br. Ibid.

3. It was said, that a que estate is traversable, if both parties claim by one and the same person. Br. Traverse per, &c. pl. 231. cites 10 E. 4. 6.

4. In trespass the defendant said, that J. S. was seised of the place, &c. and infeoffed B. who infeoffed C. And no plea, unless the plaintiff conveys by the same, by whom defendant conveyed. Br. Que Estate, pl. 36. cites 18 E. 4. 10. Br. Traverse per, &c. pl. 256. cites S. C.

5. In formedon in remainder the deed is not traversable; but if the demandant claims by the same by whom the tenant claims, the deed is traversable, and he may chuse to traverse the deed or the gift. Br. Traverse per, &c. pl. 179. cites 4 H. 7. 9.

6. In replevin the defendant said that B. was seised in fee and leased to E. for 60 years, which E. granted his interest to the defendant anno 38 H. 8. by which he was possessed, and distrained for damage feasant. The plaintiff said, that this same E. anno 32 H. 8. granted his interest to him. He shall not traverse the grant in anno 38, for he has confessed and avoided it by the elder grant obtained. Br. Confess and Avoid, pl. 65. cites 2 E. 6.

[399] S. C. cited per Cur. Ld. Raym. Rep. 238. Trin. 9 W. 3. in case of Lambert v. Cook.

7. Where the parties do not claim by one and the same person, the dying seised shall be traversed, and not the discent. Le. 310. pl. 429. Arg. in case of MADEWELL v. ANDREWS, cites D. 366. Vernon's case.

8. In replevin by H. against W. the defendant made consufance as bailiff to H. because A. in 1 E. 6. leased to B. for 90 years, who assigned the term to C. who granted it to D. who granted it to E. who granted it to H. The plaintiff confessed the assignment to C. and said that D. took to baron J. S. who granted to the plaintiff; and traversed the grant to E. Adjudged that this traverse was ill; for a lease for years cannot be gained but by a lawful grant, and therefore the last lease ought not to be traversed by him; but the other party ought to traverse the first lease, or shew how he came to it again, to enable him to make the 2d grant. 6 Rep. 24. b. Hill. 41 Eliz. B. R. Helyar's case.

Cro. E. 650. pl. 6. HELLIER v. WHYTIER, S. C. accordingly, and adjudged (absente Gawdy) for the defendant.—Mo. 551. pl. 743. S. C. the defendant demurred,

because the traverse was superfluous, he having made title before, and paramount the grant, which he offered

offered to traverse; whereas he should have pleaded the former assignment, and prayed judgment without traverse; otherwise it amounts to a confessing and avoiding, and to a traverse also. And adjudged for the avowant, for the insufficiency of the traverse.——S. C. cited 2 Bulst. 1. Mich. 10 Jac. in case of *Rice v. Harris*.——S. C. cited *Ld. Raym. Rep.* 237, 238. in case of *Lambert v. Cook*.

9. But in case of a *feoffment*, the first *feoffee* must confess and avoid the last *feoffment*, as by disseisin, &c. For a disseisor may gain an estate in fee, whereas a lease for years can be only by lawful conveyance. But when H. claimed by a former assignment of a term, it would be impertinent to traverse, that he after assigned his interest; for perhaps he did assign all his interest without having any. 6 Rep. 25. a. in *Helyar's case*.

At the end of the case of *LAMBERT V. COOK*, in *Ld. Raym. Rep.* 238. there is a note, that the Court said the case of *Denny v. Mazey* was a blind case. *See (B. b), pl. 3.

10. In *replevin*, &c. the defendant justified, for that M. was seised in fee, and upon the 20 Sept. 1 W. & M. demised the premises to him for a year, and he entered, and so avowed for damage feasant. The plaintiff confessed the seisin of M. but said, that before the lease to the defendant, viz. 5 June 1 W. & M. she demised to the plaintiff for 6 years, &c. and traversed the lease made to the avowant. The avowant demurred generally. Pollexfen Ch. J. inclined, that the traverse was no cause of demurrer, though it might have been omitted, and that there were divers authorities against *HELYAR'S CASE*; and that the books generally are only, that there needed no traverse, as the case of the *BISHOP OF SALISBURY V. HUNT*, Cro. C. 581. and *KELLAND V. WHITE*, Cro. C. 494. But the other justices doubted, by reason of *Helyar's case*, and **RICE AND HARVESTON'S CASE*. where it is said, that such a traverse makes the plea vitious. But here the demurrer being general, it is but form, and aided by 27 Eliz. where if one confess and avoid, and traverses, it is only in nature of a double plea; and cited Cro. C. 323. *EDWARDS V. WOODDEN*. And so per tot. Cur. judgment was given for the plaintiff. 2 Vent. 212. Mich. 2 W. & M. in C. B. *Denny v. Mazey*.

11. *Trespass* of taking cattle at D. The defendant justifies, that J. S. was seised of Bl. Acre, and demised it to the defendant for 3 years, from Lady-day 8 W. 3. who by virtue thereof entered and took the cattle damage feasant, &c. The plaintiff replies, that before the demise to the defendant, J. S. demised the same to him, to hold de anno in annum quamdiu ambabus partibus placuerit; and that he entered, and put in his cattle, and the defendant took them within the 2 years, [400] *absque hoc* that J. S. demised to the defendant modo & forma, &c. †See infra. The defendant demurred, for that the plaintiff did † not traverse the last lease, &c. Exception was taken to the traverse of the last lease, because the plaintiff had sufficiently avoided it before. And the same diversity was taken between leases and feoffments, as in *HELYAR'S CASE* above; and then insisted, that such traverse is ill upon a general demurrer. But after several arguments at the bar the court was of opinion, that when the first termor (admitting that the lessor had ousted him, and made a subsequent lease) re-enters, the 2d lease is become void; so that to traverse the 2d lease is to traverse a void lease, which would be ill upon a general demurrer. But the Court resolved, that this demurrer was a special demurrer; See supra †. for as to the († non,) since it is contrary to the record, they said they

they would reject it as surplufage; and therefore judgment was given for the defendant. *Ld. Raym. Rep. 237, 238. Trim. 9 W. 3. Lambert v. Cook.*

(B. b) *Where feveral Things of the fame Nature are traversable, which of them fhall be traversed first.*

1. **I**N trespass, if the defendant says, that *A. was seised, and infeoffed B. who infeoffed C. who infeoffed D. whose estate the defendant has, and gives colour by A. there, per Cur. the plaintiff may traverse any of those seoffments, because the bar is at large, and does not bind him. Br. Traverse per, &c. pl. 346. cites 16 H. 6.— Contra where the bar binds the plaintiff, as this bar here does not. *Br. Ibid. cites 15 H. 7. 3. and Fitzh. Double Plea, 83.**

Heath's
Max. 120.
cap. 5. cites
S. C.

2. A bishop brought trespass against a prior, who pleaded, that his predecessor was seised in fee, and died, and he elected prior, and entered, and gave colour. The plaintiff replied, that before this his predecessor was seised in fee in jure episcopatus, till by J. disseised; upon whom the predecessor of the defendant entered, and his predecessor died, and he was elected bishop, and entered, and was seised till the trespass. And the defendant maintained his bar, absque hoc that J. disseised the predecessor of the plaintiff, and well; for it is no traverse, that the predecessor of the defendant did not disseise J. by his entry upon him; for the disseisin to the predecessor of the plaintiff is the matter which binds, and the mesne conveyance nothing to the purpose. *Br. Traverse per, &c. pl. 355. cites 35 H. 6. 59.*

3. **Ejectment.** The plaintiff declared on a lease made by J. B. The defendant pleaded, that the land was copyhold, parcel of the manor of S. of which the king was and is seised, who by his steward granted the same to the defendant in fee, to hold, &c. The plaintiff replied, that before the king had any thing in the lands, the queen was seised in fee, in right of the crown; and by her steward, at such a court, granted the lands to the plaintiff in fee, to hold, &c. The defendant demurred to the replication, supposing that the plaintiff should have traversed the grant alleged by him in his bar. But the Court held the replication good, because the plaintiff had confessed and avoided the defendant's title, by a former copy granted by queen Eliz. and therefore needed not to traverse the grant made to the defendant. *Cro. J. 299. pl. 2. Pasch. 10 Jac. B. R. Rice v. Harveston.*

Brownl. 147,
148. S. C.
accordingly,
and the
Court held,
that such a
traverse
would make
the plea vi-
cious.—
Yelv. 227.
S. C. by the
name of
Rice v. Har-
rison accord-
ingly.—
2 Bulst. 1.
S. C. by

name of *RICE v. HARRIS*, accordingly; and Williams J. said, that it appearing by the replication, that the grant to the plaintiff, being first in time, had avoided the defendant's lease, being the * last. The defendant ought therefore to have rejoined, and so to have traversed the first grant; but by his demurrer to the replication he had confessed the grant, under which the plaintiff claimed.

* [401]

(C. b) *Supposal of the Writ, &c. traversable in what Cases.*

1. **W**RIT of entry by A. that the tenant has not ingress unless by J. N. who disseised the plaintiff. The tenant said, that the demandant infeoffed J. N. by his deed; judgment is against his deed, &c. Per Thorp, this is contrary to the writ, &c. by which he said, that A. infeoffed J. N. absque hoc that J. N. disseised A. Quod nota, that where the *plaint is contrary to the supposal of the writ*, it is not good without traversing the point of the writ, Br. Traverse per, &c. pl. 56. cites 38 E. 3. 1. and 15 E. 4. 28. 4 H. 6. 29. 8 H. 6. 2, 3. 9 H. 6. 32. and 15 H. 7. 16, 17. accordingly.

S. C. cited
Arg. Ld.
Raym. Rep.
355. in case
of Pullein
v. Benson.
* S. P. Br.
Traverse
per, &c. pl.
279. cites
22 E. 4. 39.
S. C. cited
Arg. Ld.
Raym. Rep.
355. in case
of Pullein
v. Benson.

2. In mortdancestor the tenant may allege joint-seisin in himself, and in the father of the demandant; and this is a good plea, without traversing the sole dying seised; and the reason seems to be because the *writ and declaration is only supposal*. But where the jointenancy is alleged for bar in assise, or other action, or in a title, there the sole dying seised is traversable. The reason seems to be, because the *bar, title, and replication are matters in fact, and not supposal*. Br. Traverse per, &c. pl. 185. cites 5 H. 7. 11, 12.

3. In formedon it is a good plea, that the ancestor is alive, without traversing the death, because the death is not alleged but by supposal. Contra where it is alleged by matter in fact; for where one alleges life in fact, the other shall say that he is dead, absque hoc that he is alive; and where death is alleged, the other shall say that he is alive, absque hoc that he is dead; and where the absque hoc is alleged, there shall come the visne. Br. Traverse per, &c. pl. 187. cites 6 H. 7. 5.

(D. b) *By whom, or in whose Name to be taken. Plaintiff, &c. or Defendant, Tenant, &c.*

As in precipe
against 2, if
the one takes
the entire ten-
nancy upon
him, and

1. **W**HERE the tenant takes no sans ceo in his plea, there the demandant shall take no sans ceo in his replication, but shall maintain that which the tenant has traversed. Br. Traverse per, &c. pl. 70. cites 19 H. 6. 13. per Newton.

As in forme-
don, if the
tenant pleads
jointenancy
with a

2. But where the tenant takes no sans ceo in his plea, there the demandant ought to take a sans ceo in the replication. Br. Traverse per, &c. pl. 70. cites * 19 H. 6. 13. per Newton.

Stranger not named, of the gift of J. N. judgment of the writ; there the demandant shall say that he

* is tenant as the writ supposes, absque hoc that the stranger any thing has. Br. Traverse per, &c. pl. 70. cites 19 H. 6. 13. per Newton. — Br. Maintenance de Brief, pl. 9. cites 9 H. 6. 13. — S. P. Br. Traverse per, &c. pl. 187. cites 6 H. 7. 5. per Hufley and Fairfax J.

* [402]

3. In

3. In outlawry it was said per Young, that where a man is *attainted of felony by verdict*, his *feoffees nor his mainpernors for his good behaviour shall not traverse that he was not guilty*. Br. Traverse per, &c. pl. 320. cites 7 E. 4. 2.

Contra if he was attainted by confession; per Young, which nons denied. Br.

Traverse per, &c. pl. 320. cites 7 E. 4. 2. ——— But upon outlawry of the principal, the *feoffee may traverse the felony, contrary of verdict*. Br. Traverse per, &c. pl. 323. cites 49 E. 3. 11.

4. In *debt for rent* the plaintiff declared that he demised to the defendant 26 acres rendering rent; the defendant pleaded that he demised to him the 26 acres, and also 4 acres more, *absque hoc that he demised the 26 acres tantum*; and the jury found that the plaintiff demised 21 acres only; the Court doubted for whom to give judgment; but Shelley said, that the defendant needed not to have traversed, he having confessed that and more, and then the traverse ought to come on the part of the plaintiff, viz. *absque hoc that he demised the said 4 acres prout, &c.* and then the charge of the jury would be only upon the surplusage, viz. the demise of the 4 acres; whereas here it is upon the whole 26, &c. but he would advise. D. 32. b. pl. 7. Pasch. 28 & 29 H. 8. Anon.

It is said in the margin of Dyer, that this opinion of Shelly was affirmed in C. B. as to the traverse.

5. In *debt for rent*, the plaintiff declared on a demise of 4 acres at 5 l. The defendant pleaded that the demise was of the said 4 acres and one acre more, viz. *Wh. Acre*, and that before the rent due the plaintiff entered into *Wh. Acre*. The plaintiff demurred, because the defendant did not traverse, *absque hoc that he demised the 4 acres only*; but it was said on the other side, that the traverse ought to come on the part of the plaintiff, viz. that he should have maintained the demise, *absque hoc that he demised Wh. Acre*. It was answered, that this would be a departure, and therefore the traverse should be by the defendant; because when he pleads other lease than that on which the plaintiff declared he should traverse the lease upon which the plaintiff declared, viz. he should have pleaded the lease of *Wh. Acre*, *absque hoc that he demised the 4 acres tantum*: and of this opinion was the Court, and gave judgment for the plaintiff. Lev. 263. Hill. 20 & 21 Car. 2. B. R. Salmon v. Smith.

Raym. 125. S. C. very short, and no judgment mentioned. Sid. 405. pl. 15. Salmon v. Smith, S. C. that judgment was given for the plaintiff because defendant had not concluded his plea, *absque hoc that the plaintiff had devised modo & forma*.

———Saund. 206. S. C. adjudged accordingly. But Saunders, who argued for the defendant, says at the end of his report of the case, that it seems to him that the leaving the matter at large in the plea, and so for the traverse to come of the part of the plaintiff in his replication, would have been the most apt and substantial manner of pleading; but that the Court was of another opinion, as he had before reported.

(E. b) How much.

1. **I**N forcible entry the declaration was of 2 houses, and 100 acres of land; the defendant said that A. B. was seised of the manor of D. of which the houses and land is parcel, and conveyed himself to it by tenure and escheat of the manor, and gave colour of the houses and land only, and the plaintiff intitled himself to the manor, and so he was seised of the houses and land till by the defendant disseised, and traversed the dying seised of the tenant [of] the defendant of the houses

Br. Repleder, pl. 50. S. C. for it may be that he who died seised of the land and house did not die seised of the ma-

mer; and the action is only of the house and lands. —

*houses and land alleged in the bar of the escheat, and did not answer to the entire manor, as his title was * in the premises; and yet well, per judicium. Br. Traverse per, &c. pl. 156. cites 36 H. 6. 19.*

And he need not traverse, but only that of which he complains who brought the action, and it may be that the house and land were parcel of the manor at one time and not at another. Br. Traverse per, &c. pl. 156. cites 36 H. 6. 19.

But where a fine is levied of the manor, and he brings scire facias of 3 acres parcel, there it is otherwise; for he alleges the entire manor to be in the fine. Br. Ibid.

For where one alleges condition or

2. A man may traverse more than is alleged; per Wangf. Br. Traverse per, &c. pl. 26. cites 33 H. 6. 49.

arbitrement to consist in one point, the other party may say that it was upon this condition and another, and specify what, absque hoc that it was upon the one only, or that they arbitrated this point, and another, absque hoc that they arbitrated this point only. Br. Ibid.

And in waste by the heir, if the tenant alleges grant of the reversion by the father in his life, to which he attorned, the plaintiff may say he did not attorn in the life of his father. Br. Ibid.

And in assise, if the tenant pleads that his father was seised in fee, and died by protestation seised, the plaintiff may make title by a stranger, absque hoc that the father of the tenant ever any thing had. Br. Ibid. — And it is said P. 38 H. 8. that he may say absque hoc that the father was seised in fee, &c. Ibid. — Heath's Max. 116. cap. 5. cites S. C.

So where a writ of privilege was brought by the defendant in trespass as servant of an officer of the Exchequer; the plaintiff replied, that the defendant was servant in husbandry, absque hoc that he is a servant attending at the office. And Prisot held this a good issue; and none but Laken denied it. Br. Traverse per, &c. pl. 27. cites 34 H. 6. 15. — But Brooke makes a quere if he ought not to traverse, absque hoc that the privilege extends to all the servants, prout, &c.

3. Where the justification goes to a time and place not alleged by the plaintiff, there must be a traverse of both. 2 Mod. 68. Hill 28 & 29 Car. 2. C. B. Wine v. Rider.

4. Judgment was given in debt in C. B. The defendant brought writ of error, and assigned the want of an original, to which the defendant in error pleaded a release of errors. The plaintiff in error replies, that defendant had obtained two judgments against him in the same term, and traversed that the release of errors pleaded was a release of errors in that judgment of which the writ of error was now brought. Holt Ch. J. said the plea is good now, after the release is set out upon oyer; for now it appears to be a release of this judgment, and it shall not be intended that there was another judgment between the same parties of the same term. And your replication is not good; for if there were another judgment to which this release might be applied, you should have pleaded specially and certainly, and have averred, that this release was a release of the errors in that judgment, and so have given the plaintiff an opportunity of answering that judgment, as by pleading nul tiel record; for if there be no such record, the very foundation of your replication is gone; for if there be no other judgment, this release releases this judgment, and the traverse is of a thing in the air. 2 Ld. Raym. Rep. 1054, 1055. Mich. 3 Ann. Davenant v. Raftor.

(F. b) *What must be alleged, though it be not traversable.*

1. **I**n *formacion* the explees ought to be alleged, for otherwise the count is not good; and yet when they are alleged they are not traversable. Per Martin. Br. Explees, pl. 6. cites 9 H. 6. 61. Br. Attachment sur Prohibition, pl. 1. cites S. C.

2. Attachment upon a prohibition, the writ was *tenuit placitum contra prohibitionem nostram*, and did not count that prohibition was delivered to the defendant, by which the defendant demanded judgment of the count for this default; and per Cur. he ought to count it; and yet it is not traversable. Br. Attachment sur Prohibition, pl. 1. cites 9 H. 6. 61.

3. In *formacion* in remainder, deed of remainder ought to be shewn, and yet it is not traversable. Br. Traverse per, &c. pl. 324. cites 14 H. 6. 1.

4. He who prays to be received ought to shew cause, and if the cause be not sufficient the demandant may demur; and yet he shall not traverse the cause. As a man may demur for a thing formal, as the year and day in trespass, and yet they are not traversable. Br. Resceit, pl. 133. cites 32 H. 6. 12.

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5. If a man disseises me I may have trespass for the mesne profits though I do not re-enter, but in pleading I ought to allege re-entry; but this shall not be traversed: quod nota per Pigot, and none denied it. Br. Traverse per, &c. pl. 131. cites 9 E. 4. 38. at the end.

6. In replevin if the defendant says that he took them in another place than where the plaintiff counts, it is no plea if he does not shew cause of the taking, as to make avowry, &c. and there the cause or matter of the avowry shall not be traversed, but the issue shall be taken upon the place; quod nota; issue tendered, which shall not be tried. Br. Replevin, pl. 45. cites 21 E. 4. 64.

7. Condition of an obligation was, that the obligor should not enter or claim such a house; and the defendant said that he did not enter nor claim. Keble said he claimed, prist. Per Brian, you ought to say that he came to the land, and claimed the land, and entered into it, and yet nothing of the entry shall be traversed, but only the claim; quod nota. Brooke makes a quære of this opinion; for there he alleges both points of the condition, &c. Br. Conditions, pl. 130. cites 4 H. 7. 13.

8. The consideration in an action upon the case is material, but not traversable; per Wray and Fenner Justices. Cro. E. 201. pl. 27. Mich. 32 & 33 Eliz. B. R. in case of Smith v. Hitchcock.

So where in case upon an indebitatus, the consideration

was executed, it is not traversable. Ibid. cites 5 H. 7. 21. H. 7. 13.

9. So in an action *sur trover*, the conversion is material, but not traversable; per Wray and Fenner J. Cro. E. 201. pl. 27. in case of Smith v. Hitchcock.

10. Tres-

10. *Trespass for killing, &c. a tame deer*; the defendant pleaded in bar that he was possessed of such lands for a term of years, and that a stray deer came thereon, and that he not knowing it to be a tame deer killed it, *quæ est eadem interfectio, &c.* And upon demurrer the Court inclined, that the plaintiff should have averred in his count that the defendant knew the deer to be tame, otherwise they inclined that he is excusable; but afterwards they ordered the declaration to be amended, and defendant to plead not guilty. 2 Lutw. 1359. Pasch. 3 Jac. 2. *Atkinson v. Hunter.*

(G. b) *What Thing is traversable in one Action which is not so in another Action.*

1. **ANNUITY.** Per Danby, Prisot, and others, anno 30 H. 6. A parson shall have aid of the patron without cause shewn, otherwise than to say that B. was seised of the manor of D. to which the advowson was appendant, and presented him, and that he found the church discharged, &c. and prayed aid; and the cause is not traversable where he shews cause, as it shall be where land is demanded against tenant for life; for he shall shew cause, and the cause is traversable of the aid, and not in writ of annuity; note the diversity. Br. Aid, pl. 89. cites 22 H. 6. 47.

[405] 2. *Replevin.* The defendant makes confession as bailiff to J. S. The plaintiff traverses absque hoc that he is bailiff: the defendant demurs, and judgment for him; for the difference is between trespass and replevin. In the former such a traverse may be taken, but not in the latter. 1 Ld. Raym. Rep. 233. Trin. 9 W. 3. *Harrison v. Britton.*

3. A presentment in a court leet is traversable, but no action lies against the steward, for awarding process upon it. Such presentment is traversable in replevin, not in trespass, nor in action against the judge. Ld. Raym. Rep. 470. East. 11 W. 3. in case of *Groenvelt v. Dr. Burnel & al.*

(H. b) *By what Words, or what will amount to a Traverse.*

1. **THE** words *absque hoc* are not necessary. See Saund. 22. in the case of *Bennet v. Filkins.*

2. *Et non virtute warranti, &c.* See Saund. 21, 22. Mich. 18 Car. 2. *Bennet v. Filkins.*

See 2 Salk.

628. pl. 2.

S. C. —

See (E) pl.

5. S. C.

3. *Non antea* in some cases will make a traverse; per Holt Ch. J. Ld. Raym. Rep. 349. 356. in case of *Pullen v. Benson.*

4. *Partes finis nihil habuerunt, &c.* is a sufficient denial of the seisin alleged at the time of the fine, and is a traverse in effect, though not introduced with the formal words of *absque hoc, &c.* 2 Lutw. 1625. Trin. 1 Ann. in some observations of the reporter on the case of *Walters v. Hodges.*

5. *Non*

5. *Non assumpsit*, and *non est factum*, are both of them pleas which traverse matters in those respective actions that are pleaded by way of recital; per Parker Ch. J. 10 Mod. 191. Mich. 12 Ann. B. R. Sestern v. Cibber.

(I. b) *Aliter, vel alio Modo. Good or necessary, in what Cases.*

1. DEBT against executors, who said that the party died intestate, and the ordinary committed the administration to N. and they as servants of N. sold the goods, and rendered to him an account, absque hoc that they administered in other manner. Br. Traverse per, &c. pl. 379. cites 31 H. 6. 13.

S. P. Heath's
Max. 118.
cap. 5. cites
13 H. 6. 13.

2. Debt against the marshal, upon an escape of one T. who was condemned to the plaintiff in assise in 10l. and brought writ of error; and the judgment was affirmed, and he committed to the Marshalsea, and suffered to escape, the defendant said that a great number of the king's enemies broke the prison, and took them out, absque hoc that he escaped aliter, vel alio modo. And the opinion was, that it is no plea, if he does not say that they were strange enemies, as of France, &c. For if they were of England, he may have his recompence, and if they were strangers, the plea is good without any sans ceo; & adjournatur. Br. Dette, pl. 22. cites 33 H. 6. 1.

And it was
said that if
he pleads
that strange
enemies did
it, he shall
show some of
their names,
and not
quod ignoti
fecerunt, &c.
Ibid.

3. Trespass of grass cut, the defendant justified, because he was seised of a house, and 100 acres in fee, to which he and all those whose estate, &c. have had common appendant in 40 acres, of which the place where, &c. with all manner of beasts, &c. Littleton protestando that he has not, &c. Et pro placito, that he has common there, as long as he and those, &c. dwell in the house aforesaid, with their beast levant and couchant, and not otherwise; and that at the time of the trespass the defendant was not dwelling in the said house, absque hoc that he and those whose estate, &c. have had common in any other form. Per Prisot, he ought to traverse here; for where the plaintiff confesses as much as the defendant alleges, and more, he need not traverse; but as here he has not confessed so largely as the defendant has alleged; for he alleged all times, and the plaintiff did not confess but during the time that the defendant dwelt in the house, but this traverse absque hoc that he has common in any other manner is not good; quod curia concessit, by which he traversed absque hoc that he has common there modo & forma, prout, &c. and the others e contra. Quære of the diversity of those traverses well. Br. Traverse per, &c. pl. 143. cites 37 H. 6. 34.

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4. Trespass upon the 5 R. the defendant justified, because distress was awarded against the plaintiff in the court of B. and he at the desire of the bailiff aided him to distrain, which is the same entry of which, &c. and no plea by 2 justices, because he claims nothing in the soil by such entry, by which he said further, absque hoc that he entered in any other manner; and then a good plea, per Choke Justice; for the general issue is obscure to the lay jury, but Ashton and

Heath's
Max. 118.
cap. 5. cites
S. C.

and Markham contra; for per Needham, he shall say *absque hoc* that he entered as the writ supposes; and Ashton contra, and that he shall have the general issue, and give the matter in evidence. Br. Traverse per, &c. pl. 215. cites 4 E. 4. 13.

5. Trespass upon 5 R. 2. the defendant justified his entry into the land to make *withernam* by precept, &c. *absque hoc* that he entered in other manner; and held no plea because he did not answer to the entry and expulsion of the plaintiff, by which he said *absque hoc* that he entered as the writ supposes: and the plaintiff imparled; for this last plea was held a good plea by the Justices. Br. Traverse per, &c. pl. 192. cites 5 E. 4. 26. 34. quod nota.

So in annuity against the prior of St. John of Jerusalem in England by prescription; the defendant pleaded that he is parson imparsoned of C. and that

6. An abbot by name of the abbot of D. recovered an annuity against a vicar; the defendant died, and the abbot brought *scire facias* against the successor, who said that where the abbot recovered by prescription by name of abbot, he said that the abbot had the annuity, as parson imparsoned of W. and so the recovery not naming him parson void and null in law; and because he did not say *absque hoc* that the abbot had other annuity, therefore no plea per *judicium*: for it may be that he had two annuities, the one as abbot and the other as parson. Br. Traverse per, &c. pl. 305. cites 10 E. 4. 16.

he and his predecessors have used to pay it as parsons of C. and not as priors, *absque hoc* that the plaintiff has been seised of any annuity in other manner; and after he said, *absque hoc* that the plaintiff or his predecessor have been seised of any annuity other than this annuity; judgment of the writ, and this was said a perilous issue, by which he said *absque hoc* that he was seised of this annuity in other manner, *prist*; & *adjournatur*; and this a good plea that he is charged as parson, and not as prior; for otherwise he may be doubly charged with two annuities. Br. Traverse per, &c. pl. 280. cites 22 E. 4. 43, 44.

So in debt upon escape the 18th December, the defendant pleaded

7. The traverse *aliter, vel alio modo*, shall never answer to the time, but to the manner of the conversion. Cro. E. 434. pl. 43. Mich. 37 & 38 Eliz. B. R. in an action of trover, &c. *Afcue v. Saunderson*.

the escape the 16th December, and a re-taking upon fresh suit the 17th December, and that he retained him, *absque hoc* that he is guilty *aliter, vel alio modo*; it was moved that this traverse of *aliter, vel alio modo*, answers not to the time, but to the manner of any thing alleged; and cited 33 H. 6. 28. and 37 H. 6. 67. And of that opinion were all the justices at this time, besides Popham, that the plea was ill for that cause; but *adjournatur*. Cro. E. 439. pl. 55. Mich. 37 & 38 Eliz. B. R. *Grille v. Ridgway*.

So in trespass for breaking and entering his house at Norwich, on the 10th day of November, &c. the defendant justified by a process out of an inferior court, by virtue whereof he entered the house on the 11th day of November, &c. *que est eadem fractio & intrusio*, and then traversed that he was guilty *aliter, vel alio modo*; and upon a special demurrer, and shewing this for cause, the plea was adjudged ill; and agreed by all, as well at bar as at bench, that the traverse *aliter, vel alio modo*, does not extend to time, but to the manner of doing the thing. 2 Latw. 1457. Hill. 9 W. 3. *Hargrave v. Ward*.

* [407]

8. Indictment for using a trade at H. in Suffolk, not having served an apprenticeship to that trade, &c. The defendant pleaded the custom of London to buy and sell any where, and that he being a citizen and freeman of London, did reside at F. to buy and sell goods *prout ci bene licuit*, which is the same using the trade, as in the indictment, *absque hoc* that he used it *aliter, vel alio modo*; the Court held the traverse and plea ill. The reporter in a nota says he thinks the plea ill, because the defendant had confessed the using the trade, and yet has traversed *absque hoc* that he used the trade *aliter, vel alio modo*, which he says is idle and absurd to traverse the using the

the trade aliter, vel alio modo; for he was not charged by the indictment of using it aliter vel alio modo; and therefore the traverse ought to have been omitted. Saund. 311, 312. Mich. 21 Car. 2. the King v. Kilderby.

(K. b) *Modo & Forma. Necessary, or good. In what Cases.*

See (F) pl. 1. in the notes, and pl. 5. and (M. 2).

1. **I**N avowry, if the plaintiff agrees with the avowant in the services, but varies in the quality of the land, the traverse may be absque hoc that he holds modo & forma. 9 Rep. 35. b. in BUCKNAL's case cites it as resolved 5 H. 5. 4. b.

2. Annuity of 10s. the plaintiff counted by prescription, the defendant said that he held the advowson of B. of him by the 10s. which is the same rent now in demand; judgment of the writ, and he was put to answer over; for it is only argument. Br. Traverse per, &c. pl. 23. cites 33 H. 6. 27.

3. By which he said that he held 3 acres of land in B. and the advowson of B. of the plaintiff by 10s. which is the same rent of which the plaintiff demands the arrears, absque hoc that the plaintiff and his predecessors time out of mind, &c. were seised of any yearly rent of 10s. except of the said rent of 10s. for the said advowson and 3 acres; & hoc, &c. and the plaintiff demurred, and the best opinion was that the traverse is not good; for he ought to have concluded with modo & forma, and not with an except of, &c.: for this is repugnant to his plea; for the one and the other is annual. Br. Traverse per, &c. pl. 23. cites 33 H. 6. 27.

4. Debt upon an obligation with condition to stand to the award, so that it be made before Octab. Mich. &c. the defendant said that the arbitrators such a day before the said Octab. made such award, &c. which the defendant was ready to perform, in case the plaintiff would perform his part; to which the plaintiff said that after the making of the obligation, and before the said Octab. Mich. and before the day whereof the plaintiff speaks, viz. such another day, they made award, &c. and shewed what, which he was ready to have performed, in case the defendant would have performed his part; and the defendant maintained his plea, absque hoc quod fecerunt talia arbitrium, & judicium qualia, &c. and so to issue, and it was jeofail per judicium Cur. For those words talia qualia go only to the matter, and not to the time, where it ought to have been to the time only; and therefore he ought to have said absque hoc that they awarded modo & forma, or * absque hoc that they awarded before the day in the bar; quod nota. Br. Traverse per, &c. pl. 24. cites 33 H. 6. 28.

For in assise, if the defendant pleads seoffment of a stranger, and the plaintiff pleads seoffment made to him by the same stranger before the seoffment to the defendant, it is a good replication for the defendant to say as before, absque hoc that he in- seoffed the

plaintiff modo & forma; for this goes to the time and to the matter also, viz. it goes to all. But see Modo & Forma in Littleton contra in Abridgment thereof. Br. Traverse per, &c. pl. 24. cites 33 H. 6. 28.

* [408]

5. Treipais of shovelers and herns taken, the defendant said that the place, &c. is 20 acres, which the plaintiff leased to him for 20 years, and the herns and shovelers bred there, and he took them. The plaintiff said, that the place is named the park of D. which he

leased to the defendant, except the woods and underwoods, and the hens and shoublers bred in them, and the defendant took them, of which he brought his action, *absque hoc* that he leased as the defendant supposes, &c. Br. Traverse per, &c. pl. 112. cites 14 H. 8. 1.

6. In replevin the defendant made *conusance* as bailiff to E. for that the place where was parcel of the manor of T. whereof the archbishop of York and others were seised in fee, and 3 June 11 H. 8. by deed inrolled, granted a rent-charge to H. 8. and so derived a title under that grant, and avowed the taking for arrears of rent: the plaintiff confessed the seisin of the archbishop, &c. and said that 4 Junii 11 H. 8. they made a feoffment to F. who licensed the plaintiff to put in his cattle, *absque hoc* that they 3 Junii 11 H. 8. granted the rent-charge to the king *modo & forma*, prout.; the defendants rejoin that they did grant to the king the rent-charge *modo & forma*. The jury found that they were seised, and by their deed dated 3 Junii, and inrolled 7 Junii, granted the rent to the king, &c. and adjudged for the defendant, because the issue was joined upon the grant *modo & forma*, and not upon the day, as was offered by the traverse; and the matter found is generally as alleged, and *modo & forma* goes only to what is material, and nothing by the verdict appears to be intervening after the 3d day, and before the 7th when the deed was inrolled, and then it is a good grant of the 3d of June. Hutt. 120. Mich. 8 Car. Hickes v. Mounford.

See (R)
pl. 4.

(L. b) *Traverse upon a Traverse, necessary or good or not.*

Heath's
Max. 123:
cap. 5. cites
S. C.

1. **P**RÆCIPE quod reddat against 2, the one pleaded non-tenure, and the other jointenancy with a stranger, *absque hoc* that the other named in the writ any thing has; the demandant shall say that both named in the writ are tenants, as the writ supposes, *absque hoc* that the stranger any thing has, and so traverse upon traverse. Br. Traverse per, &c. pl. 351. cites 9 H. 6. 1, 2.

2. Where the tenants first have taken a traverse, there is no need for the demandant to take other traverse; for one traverse suffices to make the issue. Br. Maintenance de Brief, pl. 2. cites 34 H. 6. 16.

3. Trespas of cutting wood the 1st day of August, the defendant justified by prescription, that the lords of the manor of D. have used to have 20 load of wood there annually, between Michaelmas and Christmas; and he being lord of D. cut the 20th of October, between Michaelmas and Christmas, *absque hoc* that he is guilty before Michaelmas, and after Christmas; the plaintiff said that he cut as in the declaration, and traversed the prescription of the 20 load *modo & forma*. And well per Cur. For where the defendant alleges title, the plaintiff shall not be compelled to maintain his day, if the defendant has no such title, and so he has election to maintain his day, or to traverse the title of the defendant. And so see Traverse upon Traverse per, &c. pl. 304. cites 10 E. 4. 2.

[409]
Poph. 101.
S. C. and
per Cur.

4. A traverse upon a traverse was adjudged good, where the place is material; as in false imprisonment in the ward of F. in London. The defendant justified by recovery in debt, and writ of execution

In Sandwich in Kent, and the taking and imprisonment there, absque hoc that he is guilty in London. The plaintiff replied, that he is guilty in London; absque hoc that there is such record in Sandwich. Mo. 350. pl. 469. Mich. 35 & 36 Eliz. Paramour v. Verwold.

if the special matter alleged in the foreign county is false, the plaintiff may

maintain his action, and traverse that special matter; and in such case a traverse on a traverse is good, when falsity is used to oust the plaintiff of the benefit which the law gives him.——Cro. E. 418. pl. 13. S. C. accordingly, per tot. Cur.——Mo. 603. pl. 834. S. C. but not S. P.——2 And. 151. pl. 85. S. C. but not S. P.

5. Traverse upon a traverse, is only where the matter traversed is but inducement. Hutt. 97. per Cur. Hill. 3 Car. in the case of Chichley v. Bp. of Ely and Thompson.

6. There never shall be a traverse upon a traverse, but where the traverse in the bar takes from the plaintiff the liberty of his action, for the place or time, or such like. There the plaintiff may maintain his action for the place or time, and may traverse the inducement to the traverse, and needs not to join with the defendant in the traverse; but at his pleasure may do the one or the other. But when the inducement is made and concluded with a traverse of a title shewn by the plaintiff, there the plaintiff is enforced to maintain his title, and not to traverse the inducement to the traverse. Arg. cites 10 Ed. 4. 3. & 49. 12 Ed. 4. 6. 2 Ric. 3. title Issue, 121. Dyer, 107. And of this opinion was the whole Court. Cro. Car. 105. Hill. 3 Car. C. B. in case of the Lady Chichesley v. Thompson and the Bishop of Ely.

S. C. cited Arg. 2 Mod. 184. in case of Stroud v. the Bp. of Bath and Wells, and Horner.——S. C. cited in totidem verbis, Arg. 2 Lutw. 1630. in the case of Crane v. the Bishop of Norwich,

Reeve, and Dubourdieu.

7. Trespass de clauso fracto. The defendant justifies his entry by the command of J. S. The plaintiff replies, that J. S. was seised in fee, and let unto him at will, and traverses the command of J. S. The defendant maintains, that J. S. commanded him to enter, and that he entered by his command, and traverses the lease at will. And hereupon it being demurred, it was adjudged for the plaintiff, that the command was traversable; and that the defendant's rejoinder to make a traverse upon a traverse, as this case is, was not good; wherefore judgment was given for the plaintiff. Cro. C. 586. pl. 5. Trin. 16 Car. B. R. Thorn v. Shering.——And cites Pasch. 38 Eliz. in PARKER'S CASE adjudged, that the command is traversable.

8. A traverse ought not regularly to be taken upon a traverse. But the difference is where the first traverse is good, and taken to the material point, and goes to the substance of the action, then there shall be no other traverse taken after. But where the first traverse is idle, and not well taken, nor pertinent to the matter, there, to that which was sufficiently confessed and avoided before, the other party may well take another traverse, after such immaterial traverse taken before. Per Saunders, Arg. Saund. 22. in case of BENNET v. FILKINS, and cited the case of *Digby v. Fitzherbert.

Lev. 192. Mich. 18 Car. 2. B. R. S. C. * Mo. 869. pl. 1207. S. C.——Hob. 101. S. C.——S. P. per Cur. Ld. Raym. Rep. 121. Mich. 8 W. 3. in

case of SERLE v. DARFORD, cites Co. Litt. 282. b. Cro. E. 99. Inglebath v. Jones, and 437. Bryan v. Spring.

Vaugh. 60.
S. C. the
King v. the
Bp. of Wor-
cester, Jer-
vis and
Hunkley.

* [410]

9. In the case of a common person the books are clear that he cannot take a traverse upon a traverse for these reasons. 1st, If you will recover any thing from another, you must not only destroy the defendant's title, but you must make your own better than his; for you must not recover by the weakness of his title, but by the strength of your own. 2. If the plaintiff should make it appear, that the defendant's title is not good, and make no title for himself, the Court could have no inducement to give judgment for him, quia in æquali jure melior est conditio possidentis. 3. It would be to no end for the plaintiff to set forth any title at all, if he can force the defendant to make out his title, and is not bound to make good his own. And these reasons hold as well in the case of the king as of a common person; by Vaughan Ch. J. Freem. Rep. 7. pl. 6. Mich. 1670. in case of the King v. Hinckley.

10. Where a traverse is not good without a special inducement, there a traverse may be to that inducement; as in trespasss, where the justification is local by virtue of his office, or the like; and in Hobart in DIGBY AND FITZHERBERT'S CASE; per Hale Ch. J. 1 Vent. 248. Mich. 25 Car. 2. B. R. in case of Hinchman v. Iles.

11. *Trespass against A. B. C. D. and E. for breaking his close, and taking his fish in his several and free fishery; A. B. C. and D. plead not guilty, E. justified; for that D. was seised in fee of a close next the plaintiff's close, and so prescribes to have the sole fishing in the river which runs by the said closes, with liberty to enter the plaintiff's close the better to carry on the fishing; and that he as servant of D. and by his command, did enter, &c. absque hoc that he was guilty aliter, vel alio modo. The plaintiff replied de injuria sua propria, absque hoc that D. his master has the sole fishing. It was argued that the traverse in the plea was immaterial; for having answered the declaration fully in alleging a right to the sole fishing and entry into the plaintiff's close, it is insignificant afterwards to traverse that he is guilty aliter, vel alio modo. And the plaintiff had judgment by the opinion of the whole Court; for the traverse in the plea is naught, because where the justification goes to a time and place not alleged by the plaintiff, there must be a traverse of both; and as to the replication they held it good, and that the defendant ought to have traversed the plaintiff's free fishery, as alleged by him, which not having done, the plea is ill. 2 Mod. 67. Hill. 27 & 28 Car. 2. C. B. Wine v. Rider.*

12. In qua. imp. the plaintiff alleged, that H. seised in fee of the manor of D. to which the advowson was appendant, presented J. S. and then granted the next avoidance to the plaintiff; and that J. S. being dead, it belongs to him to present. The bishop claims nothing but as ordinary: but the incumbent pleads, that at the bringing the writ the church was full by collation of the bishop on a lapse. The plaintiff replied, that H. seised as before, did tali die & anno present him as clerk, absque hoc that the church was full by collation. The defendant rejoins protestando, that the church was full tali die; for plea saith that it was full of the collation of the bishop tali die, absque hoc that H. did tali die, &c. present the plaintiff, &c. and so traversed the plaintiff's inducement to his traverse. It was argued, that the rejoinder

der was not good ; for that when defendant pleads a matter in bar, and the plaintiff hath traversed the same, the defendant should take issue upon that traverse, and so maintain his bar, which he has departed from by traversing another matter. And the Court held the pleadings not good. 2 Mod. 183. Hill. 28 & 29 Car. 2. C. B. Stroud v. the Bishop of Bath and Wells and Sir Geo. Horner.

13. *Where a traverse in the bar is idle and frivolous, the plaintiff may well traverse the substance of the matter of the bar.*—As in debt on a specialty, wherein the defendant bound himself to pay the plaintiff 200l. when demanded, if he did not marry her ; and assigned the breach, *that she had tendered herself to marry the defendant, but that he refused, and after married another woman.* The defendant pleaded, *that after giving the specialty, he offered to marry the plaintiff, and she refused ; absque hoc that he refused to take her for his wife, before she refused to take him for her husband.* The plaintiff replied, *that she tendered herself to marry the defendant, absque hoc that the defendant offered himself to marry the plaintiff, & hoc, &c.* Upon demurrer it was insisted, that the traverse in the replication was ill, because she traversed that which was inducement of the traverse in the bar ; so that it is a traverse upon a traverse, which the law will not allow. But it was answered, that the traverse in the bar is ill, because too large ; it being of more than is alleged in the declaration, viz. *absque hoc that he refused to take the plaintiff for his wife, before she had refused to take him for her husband, so that he intended to make this circumstance of time parcel of the issue ;* whereas such circumstance is *not alleged in the declaration,* nor any affirmation, that defendant had refused before plaintiff had ; and so the traverse in the bar being idle, the plaintiff might well traverse the substance of the matter of the bar ; and of this opinion was the Court, and judgment for the plaintiff, Carth. 99. Mich. 1 W. & M. in C. B. Crosse v. Hunt. [411]

14. *Where a traverse is merely surplusage, and not necessary, as where one traverses a thing which he had before confessed and avoided, the other party may traverse that traverse, and also the inducement to it.* Carth. 166. Mich. 2 W. & M. in B. R. Bradburn v. Kennerdale.

(M. b) Two several Traverses, or more.

1. **T**HREE traverses were suffered in one plea *to a presentment of nuisance, for not making a bridge, by 3 absque hocs ;* for the king was party, and so it is used in the Exchequer at this day, where the king is party ; quod nota. Br. Traverse per, &c. pl. 301. cites 38 Ass. 15. Br. Issues Joines, pl. 63. cites S. C. where the presentment was, *that the abbot of D. tertenant of 40 acres in D. and his predecessors, and the tertenants of the 40 acres, and those whose estate they have in the said 40 acres, have made such a bridge in D. And the abbot came and traversed the presentment, and said, that W. N. and his ancestors, tertenants of the manor of W. &c. have used to make it time out of mind, absque hoc that the abbot, or his predecessors, or the tertenants of the 40 acres, or those whose estate the abbot has in the land, have used to repair it time out of mind, &c. prout, &c. And the others e contra, and a good issue ; for these three points shall be but one and the same prescription, and it was admitted without exception.*

Br. Issues
Joined, pl.
66. cites 29
E. 20. and
says, quod
nota, two
issues in one
action, and
that the rea-
son seems to

be because they are several trespasses ; and so it was said there, that the first matter is by the said statute, and the other is by the common law, and yet the joining both in the one writ is good ; for the one is pursuant to the other.

2. Action upon the statute of Marlbridge, anno 12. *for distraining in the high street, &c. and detaining them till the plaintiff made fine ; where this second point is not in the statute, and yet the defendant was compelled to answer to both ; by which he said, that he took them in his several damage feasant, absque hoc that he took them in the high street ; and absque hoc that he detained till he made fine ; and the issue taken upon both.* Br. Traverse per, &c. pl. 135.

[412] 3. Cessavit that the tenant held of him a house and 20 acres of land, and ceased, &c. Defendant pleaded, that he held the 20th part of a house in the same vill, which is part of the land in demand by fealty and 2 pence ; and another parcel lying in a croft called B. by fealty, and a penny for all services ; and another acre in the same vill, and parcel of the same land in demand by fealty and a penny, for all services ; *absque hoc that the premises are held by an entire service, and absque hoc that the rest is held of him.* Br. Traverse per, &c. pl. 122. cites 4 H. 6. 29.

Heath's
Max. 122.
cap. 5. cites
S. C.

4. In trespass upon 5 R. 2. the tenant pleaded gift in tail to his father, and gave colour, &c.. And the plaintiff pleaded recovery against the tenant in tail by the defendant, upon a voucher and recovery in value. The defendant said, that after the gift in tail, and before the recovery, his father tenant in tail discontinued, and re-took another tail, of which estate he was seised at the time of the recovery, and died before the recoveror entered. *Absque hoc that the recoveror entered in the life of the father, and absque hoc that his father had other estate at the time of the writ and recovery, unless by the said second tail ; and absque hoc that the recoveror was seised as in the replication, and so the recovery false, and faint in law, and all the three traverses permitted.* Br. Traverse per, &c. pl. 244. cites 12 E. 4. 14. 19.

(N. b) Parcel. Where one Thing's being Parcel of another Thing is traversed, how it may be.

* And so the
descent is
well answer-
ed. Br. Re-
pleader, pl.
51. cites S. C.

1. **I**N trespass the defendant said, that the place is parcel of such a house, of which W. was seised, and infeoffed P. who had issue C. and died seised ; and C. as son and heir entered, and infeoffed the defendant, and gave colour by the first feoffor. The plaintiff said, that he himself was seised of a lane of which the place was parcel, till the defendant did the trespass, *absque hoc that it was parcel of the house.* And the defendant said, that it was parcel in the possession of P. and so to issue, and well, notwithstanding that he did not say, that the land descended to C. as heir, and he entered ; for this is all one, and to say that it was not parcel in the seisin of P. is as well as if he had said, that it was not parcel at the time of the dying seised of P. for this * goes to all his seisin. Br. Traverse per, &c. pl. 358. cites 3 E. 4. 27.

(O. b) *Without making Title.* In what Case it may be. See (L.) pl. 9.

1. **H**E, who will take a traverse against the king, shall make title. Br. Assise, pl. 459. cites 50 E. 3. and Fitzh. Assise, 442. See Vaugh. 64.
2. It was held by the Justices, that if *in trespass* the defendant pleads in bar by feoffment, the plaintiff may traverse the bar generally without making title to himself, as to say that he did the trespass, *absque hoc* that he infeoffed him. Br. Traverse per, &c. pl. 225. cites 10 E. 4. 8. For he is to recover only damages, and no franktenement. Br. Traverse per, &c. pl. 225. cites 10 E. 4. 8. — S. P. And so if the defendant intitles himself by gift in tail or the like, per tot. Cur. except Brian. *Contra in assise.* But the law seems to be with Brian; for the defendant is in possession, and therefore it seems that the plaintiff shall make title against him, as well in trespass as in assise. Br. Traverse per, &c. pl. 354. cites 18 E. 4. 10. — Heath's Max. 123. cap. 5. cites 18 E. 4. 10.
3. But *contra in assise*, where he shall recover franktenement. Br. Traverse per, &c. pl. 225. cites 10 E. 4. 8. If in assise the bar is not good, the plaintiff may have the assise without making title; but if he makes title which is not sufficient, upon which the assise is awarded, and the seisin and disseisin found; the plaintiff shall not recover; by the opinion of all the justices. Br. Repleader, pl. 63. cites 11 H. 7. 28. * [413]
4. In *replevin*, &c. it is sufficient for the avowant to plead his freehold; but if the plaintiff will traverse it, he must make a title to himself, per Cur. (Anderson absente.) But per Peryam, it is not sufficient to make it of his own seisin; but it must be paramount. Goldsb. 65. pl. 6. Mich. 29 & 30 Eliz. The Lady Rogers's case.
5. In *trespass* against husband and wife; they pleaded that J. S. was seised, &c. and made a lease to them for years, &c. The plaintiff replied, *de son tort demesne*, *absque hoc* that he leased, &c. And per Cur. the traverse is not good without the plaintiff's making himself a title. Otherwise if the defendant claims common or such like, and not possession of the land. Goldsb. 67. pl. 11. Mich. 29 & 30 Eliz. Foster v. Pretty.

(P. b) *What Plea may be pleaded at the same Time.*

1. **W**HERE the party pleads a plea and traverses the other matter, it is not material whether the matter of the plea be true or not; for he cannot say any thing but maintain the traverse. Br. Departure de son Ple. pl. 4. cites 11 H. 4. 81.
2. Note that a man cannot traverse and also say not guilty to one and the same thing. Br. Traverse per, &c. pl. 144. cites 37 H. 6. 37.

(Q. b) *Ill Traverse.* Aided by what.

1. **W**HERE a traverse is merely surplusage and not necessary; as where one traverses a thing which he had confessed and avoided before; this is merely form, and aided upon a general demurrer.

murrer. Carth 166. Mich. 2 W. & M. in B. R. Bradburn v. Kennerdale.

2. An ill traverse as the traversing a void lease is not helped by a general demurrer. See Ld. Raym. Rep. 237, 238. Trin. 9 W. 3. Lambert v. Cook.

For more of Traverse in general, see Formedon, Jointnautg, Nulance, Office found, Prescription, Presentation, Due Estate, and other proper titles.

[414]

(A) Treasure trove.

3 Inst. 132.
cap. 58.

1. **NOTHING** is said to be treasure trove but *gold and silver*,
2 Inst. 577.

2. Treasure trove cannot be *claimed* unless by *grant*, and cannot pass by the word *leet*. Br. Incidents, pl. 38. cites Itin. Cant. 6 E. 3.

3. It was presented that J. S. had found 100 *marks of gold and silver*, which came to the hands of A. who came and said that nothing came to his hands, *prist*; and so see that coin found though it be not hid is treasure trove, as it appears here. Br. Pre-sentments in Courts, pl. 24. cites 27 Aff. 19.

3 Inst. 132.
cites 22 H.
6. Corone,
446. and
says, it is a
certain rule.
—Braft.

4. *He to whom the property is*, shall have treasure trove; and if *he dies before it be found*, his executors shall have it; for * nothing accrues to the king, unless when no one knows who hid that treasure; as in case of Ireland M. 22 H. 6. Br. Corone, pl. 198, cites the printed book of abridgment of assise, fol. 61.

120. a. lib. 3. cap. 3. f. 4. says, it is quædam vetus depositio pecuniæ, vel alterius metalli, cujus non extat modo memoria, ut jam dominum non habeat, & sic de jure naturali fit ejus qui invenierit, ut non alterius sit. Alioquin si quis aliquid lucri causa vel metus, vel custodiæ recondiderit sub terra, non erit thesaurus, cujus etiam furtum fit. Thesaurus fortunæ donum creditur, & nemo servorum opera thesaurum quærere debet, nec propter thesaurum terram fodere, sed si alterius rei tunc operam sumebat, & fortunâ aliud dedit. Cum igitur thesaurus in nullius bonis sit, & antiquitus de jure naturali esset inventoria, nunc de jure gentium efficitur ipsius domini regis. — 3 Inst. 132, 133. cap. 58. Lord Coke says, that where of ancient time it belonged to the finder, as by ancient authors it appears, yet he says he finds, that before the Conquest thesauri de terra domini regis sunt, nisi in ecclesiæ vel cæmeterio inveniantur; & licet ibi inveniantur aurum, regis est, & medietas argenti est medietas ecclesiæ ubi inventum fuerit, quæcunque ipsa sperit, vel dives vel pauper.

S. P. and
such trea-
sure trove
belongs to
the king, or
to some lord,
or other by
the king's
grant, or
prescription.

5. It was said where *money, plate, silver, or bullion* is found, the proprietor or owner not known, this is treasure trove, and the king shall have it. But all mines of metal, except mines of *gold and silver*, belong to the owner of the soil, and the mines of gold and silver to the king, as appears Libro Rastal, and by the records of the Tower. Br. Corone, pl. 175.

The reason of its belonging to the king is a rule of the common law, that such goods
whereof

whereof no person can claim property belong to the king, as wrecks, &c. *Quod non capit christus, capit fiscus, &c.* It is anciently called *syndaringa*, of finding the treasure. 3 Inst. 132. cap. 58.

6. If any man happen to find in the sea, or sea-shore, precious stones, fishes, or the like, which no man was ever proprietor of, it becomes his own, because he is the first finder. Mieve's Laws of Oleron, 11. f. 33. If treasure be found in the sea, the finder shall have it. 2 Inst. 168.

Kitch. of Courts, tit. Treasure trove, cites Britton, fol. 26.

7. If any seek for gold or silver lost on the sea-shore, and finds it, he ought to restore it all to the owner, without any diminution thereof. Mieve's Laws of Oleron, 11. f. 34.

8. And if a man going along the sea-shore to fish, or do any thing else, happens to find gold or silver, he is likewise obliged to make restitution, yet he may pay himself for his day's work; and if he do not know whom to make restitution to, he ought to give notice to the neighbourhood, where he found the said gold or silver. In this case he must advise with his superiors; and if he be poor, they ought to consider his condition and advise him to the best, according to true godliness and a good conscience. Mieve's Laws of Oleron, 11. f. 35. [415]

9. As to the place where the finding is, it seems not material whether it be of ancient time hidden in the ground, or in the roof or walls, or other part of a castle, house, building, ruins, or elsewhere, so as the owner cannot be known. See 3 Inst. 132. cap. 58.

10. It appears by Glanvil and Bracton also, that *occultatio thesauri inventi fraudulosa*, was such an offence as was punished by death; but it has been resolved that the punishment of concealing treasure trove is by fine and imprisonment, and not of life and member. 3 Inst. 133. cap. 58. cites 22 Aff. 99. If treasure trove be taken and carried away, this is not felony. St. Pl. C.

25. b. cap. 16. cites Fitzh. tit. Corope, pl. 187. & 265. Because *dominus ejus non apparet*; and so it is uncertain who has any right to it.—Hawk. Pl. C. 93, 94. cap. 33. f. 24. S. P. before it has been seized by any person having a right thereto, and that it shall be punished by fine only, &c.—The punishment is by fine and imprisonment. Kitch. of Courts, tit. Treasure trove.

11. The charge of treasure trove belongs to the coroner, as appears by the statute *De Officio Coronatoris*, anno 4 E. 1. 3 Inst. 133. cap. 58. and says the ancient authors Bracton, Britton, &c. agree hereunto.

12. The king may dig in the land of the subject for treasure trove; for he has property. 12 Rep. 13. in the case of Salt Petre.

13. It seems to be agreed, that seizures of treasure trove belonging to the king, may be inquired in the sheriff's tourn; but it seems questionable whether a prescription in a court leet to inquire of the seizure of such things belonging to the lord of it, being a subject, be good or not, since it is against the general rule of the law for the court leet to take cognisance of trespasses done to the private damage of the lord, because that would make him his own judge. 2 Hawk. Pl. C. 67. cap. 10. f. 58.

For more of Treasure trove in general, see Prerogative, and other proper titles.

+ Trees.

† Trees are no part of the thing demised, but are as servants; as if one has piscary in another's land, the land adjoining is as it were a servant, viz. to dry the nets. Arg.

Godb. 117. pl. 136. Mich. 29 Eliz. C. B. in case of Lewknor v. Ford.

(A.) Disputes between Lessor and Lessee, as to Trees.

1. **W**HERE a man leases a wood which is only great trees, the lessee cannot cut it, but shall have only the grain. Br. Waste, pl. 126. cites 12 E. 4. 8.

S. C. cited Arg. Godb. 116. in case of LEWK-NOR v.

2. And per Fairfax and Jenny, if tenant for years lops trees, or cuts them, the lessor cannot take them, but shall have action of waste. Br. Waste, pl. 126. cites 12 E. 4. 8.

FORD, and admitted by Walmley Serjeant of the other side, because, as he said, there is a contract of the law, that if lessee cuts them down he shall have them, and the lessor shall have treble damages for them.—But 11 Rep. 81. b. Pasch. 13 Jac. LEWIS BOWLES'S CASE, in the 5th resolution there, it was held that if lessee for life or years cuts timber, the lessor shall have it; and that the same was resolved the term before in LIFORD'S CASE, and that because the lessor has the general ownership, right, and inheritance, and the lessee only a particular interest; and therefore by whatever means they are disannexed from the inheritance, the lessor shall have them in respect of the general ownership, and because they were his inheritance.

* [416]

But no covenant lies, yet the trees are demised with the rest; per Twissden J.

3. If lessor cuts a tree growing on the land demised, and carries it out of the land, lessee shall have trespass, and recover treble damages, as the lessor should recover against him in waste. Agreed Mo. 7. pl. 23. Pasch. 3 E. 6. Anon.

Vent. 43. Mich. 21 Car. 2. B. R. in case of Pomfret v. Roycroft.

4. A. leases to B. for life, and grants that it shall be lawful for B. to take fewel on the premises, proviso that he do not cut any great trees. Per Cur. if lessee cuts any great trees, he shall be punished for waste, but the lessor shall not re-enter, because that proviso is not a condition, but only a declaration and exposition of the extent of the grant, and lessee for life, or years, by the common law cannot take fewel but of bushes and small wood, and not of timber trees; but if the lessor in the lease grants fireboot expressly, if the lessee cannot have sufficient fewel as above, he may take great trees. 3 Le. 16. pl. 38. Mich. 14 Eliz. C. B. Anon.

4 Le. 162.

Arg. contra, cites 14 H. 8. 1. 2.—Lessee cannot shred the timber trees. Arg. Roll. Rep. 182.

5. Lessee for years, the trees being excepted, has liberty to take the browds and loppings for fireboot, but if he cut any tree, it shall be waste as well for the loppings as the body of the tree; per Hobart & tot. Cur. without question. Noy, 29. Rich v. Makepeace.

6. Where trees are excepted on a lease, the lessor may enter and take the trees, though there be not any clause of ingress or regress; per

per Foster J. Godb. 173. pl. 239. Pasch. 8 Jac. C. B. in case of Heydon v. Smith.

7. *Lessee for years* cuts down timber trees, and lets them lie, and after carries them away; so that the taking and carrying away be not as *one continued act*, but that there be some time for the distinct property of a divided chattle to settle in the lessor, an action of trespass vi & armis will lie against the lessee; and in such case *felony* may be committed of them, but not where they were taken and carried away at the same time. Allen, 82, 83. in case of UDALL v. UDALL, cites it as the case of BURY v. HEARD, which commenced 20 Jac. and continued 7 years.

8. A. *demised* ground to B. which was *pasture, except the trees*; B. put in his *cattle* to feed, which *barked the trees*; A. cannot have trespass against B. Ruled by Holt Ch. J. upon a point made and referred to him at the assises at Bury in Lent 12 W. 3. upon hearing of counsel several times, though at first he was of a contrary opinion. Ld. Raym. Rep. 739. Glenham v. Hanby.

(B) Disputes between Lord and Freeholders, &c. as to Trees.

1. KITCHIN of Court-Leets, 68. tit. Ways, says he collects upon the opinion of the book of 2 E. 4. 9. and of 8 E. 4. 9. and of 27 H. 6. 9. and 6 E. 3. Way, 2. that where a *lord* of a manor *has land upon both parts of a highway*, he shall have the trees growing in the highway; and also where a *way is over a waste of the lord's*. But where a *freeholder has land of each part of the highway*, he shall have no trees growing in the highway; and where he has land joining but upon one part of the way, he shall have no trees growing upon that half of the way. But says, that Britton, fol. 111. says, that a freeholder shall have trees, if it be not in the common highway. [417]

2. The *custom* was, that the lord should have *quicquid valeret ad maeremium*, and that the freeholders should have *ramillos*. Per Hobart Ch. J. that contains all the arms and boughs; for whatever is not maeremium is ramillum. Godb. 235. pl. 326. Mich. 11 Jac. C. B. Bishop of Chichester v. Strodwick.

3. And it was held in the case above, that the *non use*, or negligence in not taking the boughs, did not extinguish or take away the custom, as it has been often resolved in the like case. Godb. 235.

4. So where the lord by the custom is to have maeremium, and that the tenants shall have *residuum*; this shall be intended the boughs and branches. Godb. 235. pl. 326. cited in the case of the Bishop of Chichester v. Strodwick.

5. To the *owner of the soil on both sides the way*, of common right *belong* the trees that grow in the lane, whether he be lord or freeholder. The best badge of truth is the usage of taking the profit of the trees. Brownl. 42. Nota.

(C) Disputes between *Tenants in Common*.

1. **T**WO *tenants in common*; one fells the trees, and *lays them on his freehold*. If the other enters into the land, and carries them away, *trespass quare clausum fregit* lies against him, because the taking away of the trees by the first was not wrongful, but that which he might well do by law; and yet the other tenant in common might have seized them before they were carried off the land. Godb. 282. pl. 403. Mich. 18 Jac. B. R. in Polly's case.

(D) Disputes between *Tenant for Life and Remainder-man, or Reversioner in Fee*.

Chan. Prec.
15. pl. 14.
S. C. says it
was decreed
without dif-
ficulty.

1. **L**AND devised to A. for life, remainder to B. in fee, he paying certain legacies at the times limited by the will; but the remainder, *on non-payment* at such times by B. *was limited over to C. &c.* There was a great deal of timber growing on the land. B. brought a *bill for leave to cut down timber to pay the legacies*, and so prevent a forfeiture of his estate. The tenant for life and C. opposed it; but the lords commissioners decreed it; but B. to make satisfaction to the tenant for life, for breaking the ground by the carriage, &c. 2 Vern. 152. pl. 148. Trin. 1690. Claxton v. Claxton.

[418]

2. A. by deed limits a *term of 500 years to trustees for payment of debts, remainder to B. for life, without impeachment of waste*; remainder to his first, &c. sons in tail. A. died. The debts were great, and the trust not like to determine soon. B. by bill set forth the limitations, and that there was much decaying timber on the estate, and that he was reduced to great want; that the trustees had no power to cut the timber, and prayed leave to cut, allowing what damage he did. The court decreed a commission to take timber, not exceeding the value of 500 l. for the plaintiff's relief and support. 2 Vern. 218. pl. 199. Hill. 1690. Aspinwall & al. v. Leigh & al.

(E) Disputes between *Neighbours*.

1. **I**F *trees grow in the hedge*, and the *fruit falls into another's ground*, the owner may go in and take it. Per Doderidge J. Poph. 163. in the case of Millen v. Fandry, cites 8 E. 4.

2. If the *boughs of your trees grow out into my land*, I may cut them. Per Croke J. Roll. Rep. 394. pl. 15. Trin. 19 Jac. B. R.

3. A tree grows in *A.'s close*, and *roots in B.'s*, yet the body of the main part of the tree being in the soil of A. all the residue of the

S. P. per
Croke J. 3
Bulst. 198.
But if it
grows in a
hedge which

the tree belongs to him also. 2 Roll. Rep. 141. Hill. 17 Jac. *divides the land of A. and B. and*
 B. R. Masters v. Pollie.
 the roots take nourishment of both their lands, it was adjudged they are tenants in common of it.
 2 Roll. Rep. 255. Mich. 20 Jac. B. R. Anon.

(F) *Power of Trustees, as to cutting Trees.*

1. **A.** Seised of lands in fee demised the same for 500 years to B. C. and D. *in trust to pay debts, and for a charity.* B. purchased the reversion of A.'s heir at law, and cut down 1800 l. worth of timber; but left sufficient for the tenants for repairs and botes. The demise was not without impeachment of waste. Ld. C. King said it was plain that B. as purchaser of the reversion, could not enter upon the premises to cut down the timber; and though C. another trustee consented to the cutting down (which was a breach of trust in C.) B. ought not to take advantage of it; but something ought to be paid to the charity for their leave. And on his lordship's proposing 220 l. both parties agreed thereto; and so the matter was compromised. 2 Wms's Rep. 397. Mich. 1726. Bays v. Bird.

(G) *Stranger. Who shall have Trees cut down by Strangers. And what Remedy Lessor or Lessee has for the cutting them down.*

1. **I**F a stranger cuts down woods in a forest, and there is no fraud or collusion between him and the owner of the soil, the owner of the soil shall have them; and yet the owner could not cut them down, but is to take them by the livery of one appointed by the statute. Godb. 99. pl. 113. Mich. 28 & 29 Eliz. C. B. [419]
 in an anonymous case.

2. If a stranger cuts down trees, and lessee brings trespass, he shall recover but according to his loss, viz. for lopping and topping. Arg. Godb. 117. in case of Lewknor v. Ford.

3. A stranger entered into lands leased for life, and cut down timber trees, and barked them; and the lessor before seisure brought *trover for the bark*, and had judgment to recover, though the cutting down and barking was all at one time. Allen, 82. in the case of UDALL v. UDALL, cited per Cur. as a case commenced 20 Jac. and depended 7 years between Bury and Heard.

4. If a stranger cuts the trees, *lessee for life without impeachment of waste* shall have them. Poph. 193. Mich. 2 Car. Sacheverel v. Dale.

5. In trespass brought by the plaintiff for cutting down his trees, the plaintiff was *non-suited*, because it appeared that he was only lessee. Barnard. Rep. in B. R. 302. Hill. 3 Geo. 2. Odel v. King.

(H) *Grant of Trees by whom, and how.*

1. **I**F a man sells certain trees growing, and aliens the land to another before that the vendee has cut the trees, yet the vendee shall have them; per Newton. Markham said we can say no more. Br. Trespals, pl. 400. cites 20 H. 6. 22.

2. Grant of all his woods which shall grow hereafter or in time to come is not good, because it is not of a thing in esse; per Harper J. 3 Le. 29. 15 Eliz. C. B. in an anon. case.

But by grant of manor and trees, habend' the manor for 21 years without mentioning of the trees, the lessee cannot cut and sell the trees, for

3. A. demises to B. a manor for 3 lives, and by the same deed in another clause bargains and sells the trees. The habend' is of the manor only, and limits estate of that for 3 lives without mention of the trees. Per Winch J. they shall pass as a chattel immediately on delivery of the deed before any livery made thereon to pass the manor, and if livery never had been made, yet lessee shall have the trees. 2 Brownl. 193. Trin. 10 Jac. C. B. in case of Rowles v. Mason, and 197. per Warburton J. accordingly, and 201. per Coke Ch. J. accordingly in S. C.

that was all in one sentence, viz. the grant of the trees and the demise of the manor. Per Winch J. 2 Brownl. 193. cites D † 379. 18. 23 Eliz.

† It should be 374. b. pl. 18.

4. The law doth not favour fractions and severances of the trees from the freehold. 11 Rep. 48. Mich. 12 Jac. Liford's case.

5. Bargain and sale of a manor, and all the trees growing thereon, if the deed is not inrolled, the trees shall not pass without the manor. 11 Rep. 48. Liford's case.

6. Grant of all my trees within my manor of G. to A. and his heirs, A. shall have inheritance in them without livery and seisin. 11 Rep. 49. b. Liford's case.

7. A. seised in fee simple makes a lease, excepting the trees, and afterwards covenants to stand seised *de tenementis predictis cum pertin. superius dimissis, &c.* The trees pass with the inheritance, as things annexed to it notwithstanding they were not demised. 11 Rep. 50. b. Liford's case.

But otherwise in case of sale by a tenant in tail. 11 Rep. 50. Mich. 2 Jac. Liford's case.

* [420]

Jones J. makes a difference between a tenant for life

8. By a grant of trees by tenant in fee simple, they are absolutely passed away from the grantor and his heir, and vested in the grantee, and go to the executors or administrators, being in understanding of law divided as chattels from the freehold, and the grantee hath *power incident to the grant to sell them when he will, without any other special licence. Hob. 173. Hill. 12 Jac. Stukely v. Butler.

9. If lessee for life without impeachment of waste assigns over all his estate, he may dispose of the trees. Poph. 193. Mich. 2 Car. B. R. Sacheverell v. Dale.

without impeachment of waste by grant, and one who is so by indulgence of law, as tenant in tail after possibility, &c. that such things as a man hath by the law he cannot reserve to himself upon his assignment; but in case of a grant he has a larger liberty than the law gives to him. But if such tenant by grant assigns over all his estate, he cannot except the trees; but where he has a remainder it is otherwise. Poph. 195. in case of Sacheverell v. Dale.

(I) *Windfalls, Dotards, &c. Who shall have them.*

1. LESSOR shall have the *windfalls*. Arg. Godb. 117. cites Godb. 118. Culpeper's case 2 El. & 44 E. 3. Statham; and 40 Aff. 22. Anderson Ch. J. accordingly, but Rodes J. contra.—Per Anderson in LEWKNOR's case. 4 Le. 166—S. P. resolved in HARLAKENDEN's case, 4 Rep. 63. b. Pasch. 31 Eliz. B. R. in case they have no timber in them; but that if they have, then it is otherwise.—And in LEWIS BOWLES's case, 11 Rep. 81. b. the resolutions in Harlakenden's case were affirmed for good law.—Mo. 813, 814. pl. 1099. Mich. 8 Jac. Per all the justices of Serjeant's-inn in Fleet-street, S. P. in the Countess of Cumberland's case.

2. Lessee cannot justify cutting down *pollards*, by saying that they were dry, hollow, and rotten, and not timber fit for building. Mo. 101. pl. 246. Mich. 15 & 16 Eliz. Sir Roger Manwood's case. Bendl. 217. pl. 251. S. C. adjudged for the plaintiff.

3. If trees are *excepted*, &c. and they *become dotards* during the lease, yet that cannot divest the property of the lessor; per Holt Ch. J. Cumb. 453. Trin. 9 W. 3. in a note to the case of Park v. Fifield.

(K) *Timber Trees. What are, and what shall be said to be such for a collateral Respect, &c.*

1. GREAT wood specified in the act of 45 E. 3. is intended of wood which consists of trees of value, as of *ashes, beeches, and elms*, &c. but not of *hornbeams, fallows, hawthorns, maples*, &c. Pl. C. 470. b. Hill. 17 Eliz. Soby v. Molyns. 2 Inst. 643. cites S. C. and says that the whole Court upon deliberate advice held it to be no law, and that beech, horsebeech, and hornbeam are great wood, because they serve for buildings or reparation of houses, mills, cottages, &c. And in the margin there it is said it was adjudged. Pasch. 2 Jac. between Hall and Fettyplace.

2. *Birch-trees* were decreed to be timber-trees. Toth. 151. Mo. 812. pl. 1099. S. C. decreed, because it appeared that such trees, in the country where they grew, were used and serviceable for building sheep-houses, cottages, and such mean buildings; and all the justices of Serjeant's-inn in Fleet-street, upon a conference had with them, were of opinion, that in this country they were timber, and belonged to the inheritance, and could not be taken by a tenant for life.

3. A. articulated to sell land to B. for 20,000l. and the timber to be valued and paid for by B. over and above the purchase-money. Upon a reference to the master he made his report, and estimated some thousands of *saplings* at 12d. or 18d. a piece, and also *pollards*, some of which were rotten, or contained no timber, and so of *walnut-trees* as worth 20 or 40l. a tree; also *yew, cherry, crab, lime, and horse-chestnuts*, were by him valued as timber. And exception being taken thereto, Ld. C. King said, that it is the *custom of the country* that makes some trees timber, which in their nature, generally speaking, are not so, as horse-chestnut and *lime trees*; and so of *birch, beech, and asp*. And as to pollards, notwithstanding what is said in SOBY AND MOLINS's CASE, Pl. C.

470. that these are not timber, and that tithes are to be paid of their loppings, (which could not be if pollards were timber,) yet if the bodies of them are found and good, he inclined to think them timber; otherwise, if not found, they being in such case fit for nothing but fuel. And his lordship said, that if a timber tree, not worth 3 or 4l. shall be valued or paid for in the purchase, why shall not walnut-trees, some of which may be worth 10 or 20l. or even 50l. a piece? However, as they seem of a considerable value, if the parties cannot agree to lump the valuation, and as it is the custom of the country which ascertains what are timber-trees, making some esteemed such, which, in their own nature, generally are not, especially in countries where timber is scarce: his Lordship said, he should direct an issue to try whether any and which of those trees are, by the custom of the country, to be accounted timber. Trin. 1731. 2 Wms.'s Rep. (603.) (606.) Duke of Chandos v. Talbot.

For more of Trees in general, see Copyhold, Marresme, waste, and other proper titles.

Fol. 545.

Trespass.

See (I).

(A) With Continuando.

[1. **T**RESPASS lies with continuando by divers days together, and the party shall not be compelled to bring several actions. 29 E. 3. 35. adjudged; for it is one trespass.]

(A. 2) Assault. What. [And Menace.]

[1. **I**F a man holds me by the arm, this is an assault in law. It seems 3 H. 4. 9. will warrant it; but there it seems it was justifiable.]

1 Hawk.
Pl. C. 134.
cap. 62. s. 1.
saith, that
notwith-
standing the
many an-
cient opi-
nions to the

[2. If a man saith, that he will cut my arm, it is an assault. 37 H. 6. 20. b.]

[3. If a man saith to another, that if he will appeal him of treason, he will defend himself by his hands upon his body, and rather * than he shall kill him, he will kill him; this is an assault in law. † 37 H. 6. 3. Curia.]

contrary, it seems at this day agreed, that no words whatsoever can amount to an assault.

† (E) pl. 3. S. C.

* [422]

4. So

[4. So if a man calls me traitor, and I say to him *mentiris in capite tuo*, and if he will appeal me of treason, I will defend myself by my hand upon my body, during the life of one of us. This is an assault, though it be upon a condition precedent. 37 H. 6. 3. 20.] Br. Trespass, pl. 197. 37 H. 6. 2, 3. [pag. 2. b. and 3. and pag. 20. b. are both the same S. C.]——See (E) pl. 3. S. C.

[6. So if a man says to me, that if I will not cease my suit, which I have against him, he will beat me; this is an assault, though conditional. 37 H. 6. 20. b.] N.B. There is no pl. 5. Br. Trespass, pl. 197. cites 37 H. 6. 2, 3. Per Prisot.

[7. So if a man saith, in presence of the court, or in a church, to another a false matter, and the other replies, that if he will come out of the court or church into the field, and say so, * he will break his bones, this is an assault. 37 H. 6. 20. b.] Br. Trespass, pl. 197. cites 37 H. 6. 2, 3. that it is a menace, and not lawful. — * Orig. is (Il luy naufrera.)

[8. If a man rebukes another with ill words, by which he dares not stay in the vill; this is an assault. 27 Aff. 11. adjudged] This was a suit by collector of the fifteenths, *pro rege & seipso* of assault and battery, as he was collecting of the fifteenths in D. and it was found, that the defendant rebuked the collector in collecting the fifteenths, so that he dared not to stay in the vill, but did not beat him. And this was adjudged an assault, but no battery; and the plaintiff recovered damages 100s. Quære, if the king had not been party. Br. Trespass, pl. 246. cites S. C.

[9. Action of *trespass* lies for an assault. 40 E. 3. 40. 42 E. 3. 7. 45 E. 3. 24. b.]

[10. If a man strikes at me with an hatchet, though he does not touch me, yet this is an assault in law. 22 Aff. 60. adjudged.] Br. Trespass, pl. 336. cites S. C. per Thorpe. And the case was, that the defendant came to a tavern in the night to buy victuals, and the doors being shut, he struck upon the doors with a hatchet; and the plaintiff, who kept the tavern, putting his head out of the window, and bidding the other to leave off, he struck against him with the hatchet, but did not touch him.——S. C. cited by Doderidge J. 2 Bulst. 339. Hill. 12 Jac. in case of Wilson v. Dodd.——Roll. Rep. 177. S. C. cited by Doderidge, quod fuit concessum, per Coke Ch. J. in case of Wilson v. Dodd.——And ibid. 328. Hill. 13 Jac. B. R. in case of Curtis v. Dowie.

S. P. Hawk. Pl. C. 133. cap. 62. s. 1. And so if a man strikes at me without a weapon, it is an assault.

S. P. And so if he holds up his hand against another, and says nothing, it is an assault. But if one strikes another upon the head, arm, or breast, in discourse, it is no assault, there being no intention to assault. Mod. 3. pl. 13. Mich. 21 Car. 2. B. R. per Cur. in an anonymous case.

[11. If a man delivers to another a subpoena, this is an assault. Trin. 13 Jac. B. between ELPIN AND HUTTON, per Curiam.]

12. In assault, battery, and wounding, the evidence to prove a provocation was, that the plaintiff put his hand on his sword, and said, if it was not assise-time, I would not take such language from you. Adjudged no assault; for he declared he would not assault him, the judges being in town, and the intention, as well as the act itself, makes an assault. Mod. 3. pl. 13. Mich. 21 Car. 2. B. R. Anon. 2 Keb. 545. pl. 13. S. C. by the name of TURBERVILL v. SAVAGE, and says, that the plaintiff bent his fist at the same time

time that he laid his hand on his sword and spoke the words; and the Court held it no assault, as it would be without that declaration. But it was further sworn, that the plaintiff with his elbow punched the defendant, which, if done in earnest discourse, and not with intent of violence, is no assault; nor then is it a justification of battery after a retreat.

2 Lev. 102. 13. *Drawing a sword, and brandishing it in a menacing manner*
 Pasch. 26 against the plaintiff, but did not touch him, is assault, but no bat-
 Car. 2. B. R. tery; and so shall have no more costs than damages. Vent. 256.
 S. C. by the name of Pasch. 25 Car. 2. B. R. Anon.

SMITH v.

NEESAM; but that is only as to the point of costs, but does not state the manner of the assault.—
 3 Keb. 383. pl. 1. S. C. says it was, that a woman shook a sword in a cutler's shop against the plain-
 tiff, being on the other side of the street.

6 Mod. 173. 14. *Bailiff* being within reach of defendant, defendant having
 S. C. and a fork in his hand, keeps off the bailiff from touching him and re-
 says that if treats into his house, bailiff has no remedy but an action for the
 the defend- assault; for the holding *up the fork at him*, when he was within
 ant had pre- reach, is good evidence of that. 1 Salk. 79. Trin. 3 Ann. B. R.
 sented a gun Genner v. Sparkes.
 at him at
 such a dis-
 tance as the
 shot would reach him, an action of assault would have lain against him.—S. P. Hawk. Pl. C. 133.
 cap. 62. f. 1.

15. Every *battery includes an assault*, therefore on an indictment
 of assault and battery, in which the assault is ill laid if the defend-
 ant be found guilty of the battery, it is sufficient. Hawk. Pl. C.
 134. cap. 62. f. 1.

Fol. 546.

(A. 3) * *Battery. What shall be said a Battery.*

* *Any injury whatsoever, be it never so small, being actually done to the person of a* [1. IF a justice of peace makes a warrant to J. S. to arrest J. D.
 and to bring him before himself, and J. N. comes in aid of
 J. S. and † lays his hands molliter upon the shoulders of J. D. [and]
 says to J. S. *this is the man*, this is not any battery. Hill. 12 Ja.
 B. R. between † WILSON AND DODD by Coke.]

man in angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching
 him in anger, or violently jostling him out of the way, are batteries in the eye of the law. Hawk. Pl. C.
 134. cap. 62. f. 2.

† S. P. Hawk. Pl. C. 134. cap. 62. f. 2.

‡ Roll. R. 176. pl. 15. Pasch. 13 Jac. S. C. but S. P. does not appear.—2 Bulst. 335. S. C.
 but S. P. does not fully appear.

[2. If a man delivers a subpoena to another, this is not any bat-
 tery. Tr. 13 Ja. B. between ELPIN AND HUTTON, per Curiam.]

So if another 3. Upon evidence in battery, Popham, Fenner, and Williams,
 had held A. directed the jury, that if A. assaults B. and in fighting A. falls to
 in his arms, the ground, and then there B. beats and wounds him, that this is
 and then B. an assault in B. not justifiable. Noy, 115. Hudson v. Crane.
 strikes him,
 that assault

is a battery in B. not justifiable, &c. and the jury found accordingly. But Yelverton and Tanfield on
 the contrary, because it is but a continuance of the former assault. And that all is de son assault de-
 mefne. Noy, 115. Hudson v. Crane.

4. In action of assault and battery, the plaintiff counted that
 the defendant *struck the plaintiff's horse*, whereby the plaintiff fell;
 this was held good and no material variance, because licet sapius
 requisitus is only matter of form. Arg. Hard. 41. in case of Har-
 ris v. Ferrand, cites it as Mich. 15 Car. B. R.

5. The

5. The least touching of another in anger is a battery. Ruled per Holt Ch. J. at nisi prius. 6 Mod. 149. Pasch. 3 Annæ in the case of Cole v. Turner.

6. If two or more meet in a narrow passage, and without any violence or design of harm the one touches the other gently, it is no battery. Per Holt Ch. J. at nisi prius. 6 Mod. 149. Cole v. Turner.

*But if one uses violence against another to force his way in a passage in a rude inordinate manner, or if any struggle about the passage to that degree as to do hurt, * this will be a battery.* Ruled by Holt Ch. J. 16 Mod. 149. Pasch. 3 Annæ at nisi prius in case of Cole v. Turner.

* [424]

7. Spitting in one's face is a battery. Per Holt Ch. J. 6 Mod. 172. Pasch. 3 Annæ, B. R. the Queen v. Cotefworth.

(B.) Trespass. Against whom it lies, in respect of Interest.

[1. IF my beasts are in the keeping of J. S. and during this time do trespass to another, he shall have trespass against me or J. S. at his election; but he shall not have satisfaction against both. 7 H. 4. 31. b.]

If A. has the custody of the beasts or hogs of B. and they are put into B.'s yard, if these do a trespass to the land of C. adjoining, A. shall be punished in trespass, and this though B.'s servant did wait upon them. Clayt. 32. Dawtry v. Huggins.

If agisted cattle do a trespass, the owner of the soil where, &c. shall answer for that trespass, cited in the case of DAWTRY v. HUGGINS. Clayt. 33. as Bateman's case.

2. A man shall not have trespass against him who has the franktenement as disseisor, &c. before regrefs made upon him; per Newton where the defendant pleads his franktenement, there the plaintiff in his replication ought to shew a regrefs, for disseisor has the franktenement and ought to have the profits, till it be reformed by entry or action mixt or real. Br. Trespas, pl. 127. cites 19 H. 6. 23.

3. If I bail goods and the bailee gives and delivers them, I shall not have trespass; for he had lawful possession. Br. Trespas, pl. 295. cites 2 E. 4. 4.

4. Note Finch's law, li. 3. c. 6. that no action of trespass will lie for a lessee for years against the lessor, although he distrained without cause. And see there the reason. Q. per Holt Ch. J. 11 Mod. 209. pl. 13. cites 9 Rep. 76. Yelv. 148. Wing's Max. 1. 703.

(C.) Trespass of Assault and Battery. What will be a good Cause of Justification.

See (A. 3)
(G) (F. 2).

[1. IF a man be in a rage and does great mischief, his parents may justify the chastising and beating him with a rod, to the intent to reduce him into his good senses again. 22 Aff. 56.]

Br. Trespas, pl. 235. cites S. C. but says nothing of the beating being by parents.

Jo. 249. pl. 3. S. C. but reports that it was a stander-by and not A. the person cheated, that laid hold of the cheat, and carried him immediately before the justice, was

a good justification. — Cro. C. 234, 235. pl. 16. S. C. according to Roll, and judgment for the defendant by 3 justices (absent the Ch. J.) and they held it to be pro bono publico to stay such offenders.

2 Hawk. Pl. C. 77. cap. 12. s. 20. cites S. C. and says, that from the reason of this case it seems to follow, that the arrest of any other offenders by private persons for offences in like manner, scandalous and prejudicial to the public, may be justified.

• [425]

[2. If A. plays at dice with B. in the house of a justice of peace, the which B. is a common cheater, and there cheated A. of his money; the defendant in an action of battery may justify that he for the cause aforesaid put his hands upon him to bring him before the said justice of peace, and that he brought him accordingly: and the justice bound him over to the sessions where he was indicted and found guilty of the said cheating. And this is a good plea though the defendant was not any officer; for it concerned himself and was for the public good. Mich. 7 Car. B. R. between HOLLEDAY AND * OXENBRIDGE adjudged upon a demurrer, where the justice was Sir Nicholas Carey in Surrey.]

[3. If A. incites a dog upon B. an infant, and upon this C. comes to A. and lay his hands softly upon him, to the intent to stay his hands, so that he shall not incite the dog upon B. this is lawful and justifiable in action of assault and battery brought by A. against E. Mich. 10 Car. B. R. between WALTER AND JONES per Curiam upon a demurrer, but adjourned upon the pleading. Intratur Trin. 10 Car. Rot. 409. and after issue taken by consent.]

4. In trespass of battery and wounding, the defendant said that W. assailed the defendant to have beat him with a knife, and the defendant took the handle of the knife in his hand, and the plaintiff came in aid of W. and took the blade of the knife in his hand, and cut his own hand with the blade of the knife, absque hoc that he beat or wounded him, prist. The plaintiff replied that he beat and wounded him as above, prist; and the others e contra. Br. Trespas, pl. 235. cites 22 Ass. 56.

5. Trespass of assaulting him and taking his horse, the defendant said that J. C. had the tithes of B. in farm for 6 years, and certain barley was severed from the 9 parts, and the plaintiff took and carried them to D. and the defendant came and found the horse there in the same barley, damage feasant, and he by command of the defendant took the horse and the barley, and the plaintiff would have disturbed him; so that the ill which he had was de son assault demesne, and in defence of the goods, and a good plea. Br. Trespas, pl. 134. cites 19 H. 6. 65.

6. A justification for a battery is no justification for wounding, &c. F. N. B. 86. (K) in the new notes there (d) cites 21 H. 6. 27.

And a justice of peace may arrest a man at his discretion to find surety of peace, and though he permit him to go without surety,

7. Trespass of assault and battery; the defendant said that at the time of the trespass he was a justice of peace, and the plaintiff made an assault upon B. and for conservation of the peace he came to the plaintiff, and charged him to keep the peace, and he said that he would not, and the defendant put his hands upon him peaceably, and arrested him to find surety for his good behaviour, &c. which speaking and putting of hands are the same assault and battery of which, &c. And the Court held it a good plea, without saying that he

just

set him to gaol, and yet to make the matter clear the defendant alleged the arrest, as above, and that after he *escaped out of his custody*, &c. Br. Trespas, pl. 177. cites 9 E. 4. 3.

the party cannot punish him, because he is a justice

of record; per Littleton Justice, quod non negatur. Br. Trespas, pl. 177. cites 9 E. 4. 3.

8. There are some actual assaults on the person of another, which do not forfeit a recognizance of the good behaviour, as where an *officer having a warrant against a man, who will not submit to him, beats or wounds him in the attempt to take him*, or where a *parent reasonably chastises his son, or a master his servant, or a school-master his scholar, or a gaoler his prisoner*; or, as some say, a *husband his wife*; or where one in a proper mannner confines and *beats a friend who is mad, &c.* or where one *forces a sword from another, who threatens to kill a man with it*; or where one *gently lays his hands on another, and stays him from inciting a dog upon a man*; or where I *beat one* (without wounding him, or throwing at him a dangerous weapon) *who wrongfully endeavours with violence to dispossess me of my lands or goods*, and will not desist upon my laying my hands gently on him, and disturbing him; or where a man *beats one who attempts to kill any other*; or where a man *threatens to kill one who puts him in fear of death in such a place, where he cannot safely fly from him*; or where one *imprisons those whom he sees fighting, till the heat be over*; or where a man *beats, or as some say, wounds or maims one who makes an assault upon his person, or that of his wife, parent, child, or master*; or, as some say, where one *beats another in defence of his servant*. Hawk. Pl. C. Abr 151, 152. f. 16.—Hawk. Pl. C. at large, 130, 131. cap. 60. f. 23, 24. And says that therefore these are justifiable, ibid. 134. cap. 62. f. 3.

[426]

(D) *What Person may justify it. [In Defence of another, &c.]*

[1. **T**HE *baron* may justify the battery of another, in defence of *his feme*; for she is your [his] chattel. *19 H. 6. 31. b. 66.] Br. Trespas, pl. 134. cites 19 H. 6. 65.

—So in *trespass by husband and wife*, for an assault and battery on the wife, the defendant pleaded *for assault demesne of the wife*; the plaintiffs replied, that *the defendant was going to wound her husband, and that she insultum fecit to defend him*. Upon demurrer, it was insisted that *insultum fecit* was naught, and that they should have pleaded *molliter manus imposuit*. But the Court held, that a wife may justify an assault in defence of her husband, and if the defendant was holding up his hand to strike the husband, the wife might make an assault to prevent the blow. And judgment for the plaintiff. 1 Salk. 407. pl. 2. Mich. 7 W. 3. B. R. *Leeward v. Basile*.—Ld. Raym. 62. S. C. accordingly.

* S. P. Br. Trespas, pl. 128. in the large edition, cites 29 H. 6. 31. but it should be 19 H. 6. 31. and so are the smaller editions.

[2. The *master* may justify the battery of another, in defence of *his servant*; for the servant is in a manner his chattel. †19 H. 6. 31. b.] Br. Trespas, pl. 34. cites 19 H. 6. 65. and pl. 189. cites

19 H. 6. 31. and 66. but cites 9 E. 4. 48. contra.—Ow. 150. in case of *SEAMAN v. CUPPLEDICK*, where in trespass of assault and battery, the defendant justified in defence of his servant, viz. that the plaintiff had assaulted his servant, and would have beaten him, &c. Yelverton held the bar good; for that

that otherwise he might lose his service, and cited 19 H. 6. 60. a. but Williams J. contra. And ~~the~~ said that a man may defend his servant, but he cannot break the peace for them; but that if another assaults the servant, the master may defend him, and strike the other, if he will not let him alone. — A master cannot justify in defence of his servant, because he might have an action per quod servitium amisit. Per Cur. 1 Salk. 407. pl. 2. Mich. 7 W. 3. B. R. in case of Leeward v. Baslee. — Ld. Raym. Rep. 62. accordingly in S. C.

† S. P. Br. Trespass. pl. 128. in the large edition, cites 29 H. 6. 31. but it should be 19 H. 6. 31. and so are the smaller editions.

S. P. And [3. The *servant* may justify the battery of another in defence of so of his *his master*. 11 H. 6. 16. quære. 14 H. 6. 24. b.]

Trespass, pl. 189. cites 9 E. 4. 48. — And he may kill a man in saving the life of his master, if he cannot otherwise escape. Br. Trespass, pl. 217. cites 21 H. 7. 39. per Tremaine,

S. P. And to take bows, arrows, gauntlets, &c. with which the party might strike them, and retain them in their keeping till the malice be assuaged. Contrary of a coat of mail, &c. with which the party cannot strike. Agreed. Br. Trespass, pl. 37. cites 35 H. 6. 50, 51.

S. P. But Serjeant Hawkins says, it is said that a servant cannot justify beating another in defence of his master's son, though he were commanded by the master so to do, because he is not servant to the son; and for the like reason it is said, that a tenant cannot justify beating another in defence of his landlord, &c. Hawk. Pl. C. 131. cap. 61. f. 24. — Ibid. 134. cap. 62. f. 3.

2 Lutw. 1483. at the end of the case of SHINGLETON v. SMITH, is a note of the reporter, that it was said in that case by Powell J. that a servant may justify in defence of his master, but he can not justify a battery in defence of the goods of his master.

[4. If a *lunatic* beats a man, this shall not excuse him in trespass, because it is but to repair him in damages; but otherwise it is in case of * felony, because he cannot do it with a felonious intent. Hobart's Reports, 181.]

Fol. 547. 4Rep. 124. b. in a note of the reporter's in Beverly's case — Hob. 134. pl. 179. in case of WEAVER v. WARD; and says that therefore no man shall be excused of a trespass.

[427] 5. The *father* cannot beat another in defence of his son. Br. Trespass, pl. 189. cites 9 E. 4. 48. per Catesby.

But if the father and another are combating, and the son comes in aid of his father, and strikes the other; this was held justifiable, though the father began the affray; but quære of that, but so it is holden; but here the other party did begin upon the father; therefore here it was held clearly justifiable. Clayt. 120. pl. 211. Greis's case.

(E) Trespass. Assault. What will be good Cause of Justification.

Br. Trespass, pl. 79. cites 3 H. 4. 8, 9. in the written book, S. C. [1. IF a man comes to stop my river which runs to my mill, I may well justify the holding of him by the arm. 3 H. 4. 9.]

See (G. 2) [2. If a man has licence (by him who has power to give it) to erect a booth in a fair, and when he is about making of it, another comes to break it down, he may well justify the holding of him by the arm to stay him from the breaking of it down. 11 H. 6. 23.]

See (A. 2) [3. If a man calls another traitor, upon which he says that he mentitur in capite, and that if he will appeal him of treason, he will defend himself by his hand upon his body during the life of one of them, according to the form of the law; this is a good justification of the assault. 37 H. 6. 3. 20.]

But per Prisot, if those words (secundum formam legis) had been omitted, the plea had not been good, but the other justices held it would have been good, notwithstanding such omission.

4. If a servant departs from his master, or if an heir in ward departs from his lord, it is not lawful for the master, nor for the lord, to retake them with force, nor to lay their hands upon them, but require them, &c. And if they refuse, then to take their actions. Br. Faux Imprisonment, pl. 37. cites 38 H. 6. 25. per Markham, & nemo dedixit.

5. *Trespass of battery and imprisonment.* The defendant justified inasmuch as the plaintiff lay in wait at D. to rob the people, and made assault upon A. and commanded him to deliver his purse, by which the defendant took him and put him in the stocks. And the lying in wait, and the assault upon A. is not double, because some act ought to be done, as where a man justifies for suspicion; quod nota. Br. Double, pl. 138. cites 6 E. 4. 27.

6. In action of false imprisonment, the best opinion was, that it is a good plea, that the defendant was a watchman, and the plaintiff was a night-walker, and the defendant cast his hands upon him peaceably to see his visage, which was the same imprisonment, &c. Br. Faux Imprisonment, pl. 39. cites 4 H. 7. 2. Every man may take night-walkers who go by the way; for it is for the common profit. Per Hussey and Fairfax. Br. Faux Imprisonment, pl. 15. cites 4 H. 7. 18. at the end.

7. A. takes B.'s horse. — B. the same day requested A. to re-deliver it, but A. refused. — B. said, if A. would not deliver him, he would take it in spite of his teeth; and takes up a stick lying on the ground, and made towards A. with the stick. This is an assault justifiable. Kelw. 92. pl. 4. 22 H. 7. Anon.

8. Striking a man's horse is such an assault upon a man's goods, as will justify striking the person; and stopping the horse is stopping the man. Clayt. 109. Booth v. Jenkinson.

(F) Trespass. Assault and Battery. What will be [428]
good Cause of Justification of Battery. Assault to
the Person.

[1.] If a man assaults me, and I can escape with my life, it is not lawful for me to beat him. 2 H. 4. 8. b. Curia.] S. P. per Markham, quod Curia, concessit; but Brooke says, it seems, that I may beat him, if I cannot otherwise escape without strokes or mayhem, as well as for life. Br. Trespass, pl. 71. cites S. C.

[2. [So] If a man assaults me, I am bound to go from him as much as I can, and not presently to beat him. 19 H. 6. 31.]

[3. [But] If a man assaults me, I am not bound to attend till the other has given a blow; but I may beat him before in my defence, for perhaps I shall come too late after. 2 H. 4. 8. b. Curia.] Br. Trespass, pl. 71. cites S. C. per Cokeyn; quod Curia concessit. — A man may beat another in defence of himself, per Cur. Br. Trespass, pl. 128. in the large edition, cites 29 H. 6. 31. but it should be 19 H. 6. 31. and so are the smaller editions.

[4. In an appeal of maihem, de son assault demesne is a good justification. 41 Aff. 21. admitted by issue, 28 E. 3. 94. Fitzh. Corone, 141. Mich. 27 El. B. R. Rot. 38. inter communia inter

JOHN DE IVES, appellant, and RICHARD SKIRBEN and NICHOLAS TAYLOR, defendants. But the defendants pleaded, that the plaintiff assaulted them, & eos vulneravit & ad terram prostravit ad interficiendum, & malum si quod, &c. de insultu proprio querentis, & issue de injuria sua propria. New Entries, 52. d. Old Entries, 45. Mich. 4 Car. MITCHEL v. BRABANT, B. R. so pleaded, and issue joined thereupon.]

5. Where a man, *in his own defence*, beats another, who first assaulted him, &c. he may take an advantage thereof upon an indictment, as well as upon an action; but with this difference, that in the first case he may give it in evidence upon the plea of not guilty, and in the latter he must plead it specially. Hawk. Pl. C. cap. 62. pl. 3.

Fol. 548.

(G) Trespass of Assault and Battery. *Justification.* *What will be good Cause of Justification.*

See (C).

Hob. 134.
pl. 179.
Pasch. 14
Jac. S. C.
Mo. 864.
pl. 1192.
S. C. —
S. C. cited
Raym. 423.
per Ray-
mond J. in
case of Lam-
bert and
Ollier v.
Besley. —
S. C. cited
2 Jo. 205.
In case of
Dickinson
v. Watson.

[1.] **I**T is no good cause of justification, *that all the companies of soldiers of London were commanded by the privy council to muster, and that the plaintiff and defendant were under one captain, and their captain skirmished with another captain, and the defendant in this skirmish discharged his gun, the which casually, against his will, hurt the plaintiff, (viz. because it was discharged in his face.)* Though this was in the service of the commonwealth, that is to say, in the practice to make them able to defend the realm; yet it will not excuse, because he does not say that he could not do otherwise; as if he had said, that the plaintiff run cross his piece when he was discharging it, or had expressed the case with the circumstance, [and] so it had appeared to the Court, that it had been inevitable; and that the defendant had not been guilty of any negligence to give occasion to the hurt. Hobart's Reports, 181. between WEAVER *AND WARD adjudged, because it is but to be repaired in damage for the hurt.]

So in tres-
pass for an

assault, battery, and wounding, by shooting out the plaintiff's eye. The defendant pleaded in bar, that he was a collector of the hearth-money: and for the better securing the money collected he rode with fire-arms, and having a pistol in his hand, and intending to discharge it, to prevent mischief, he seeing none coming that way did discharge it; and on his discharging it, the plaintiff casually came that way, and if he received any harm, it was against the will of the defendant, quæ est eadem transgressio. The plaintiff demurred, and had judgment; and upon a writ of error brought, judgment was affirmed, nothing being urged besides the plea, which the Court held insufficient; for the defendant shall never be excused in trespass, unless upon an inevitable necessity, which was not shewn here. Besides he did not traverse absque hoc aliter vel alio modo, as was done in WEAVER AND WARD's CASE, in the like plea; and yet in that case the plaintiff had judgment. 2. Jo. 205. Pasch. 34 Car. 2. B. R. Dickinson v. Watson.

Serjeant Hawkins says, it seems, that a man shall not forfeit a recognizance for the good behaviour, by a hurt done to another merely through negligence, or mischance; as where one soldier hurts another by discharging a gun in exercise, without sufficient caution; for notwithstanding such person must, in a civil action, give the other satisfaction for the damage occasioned by his want of care, yet he seems not to have offended against the purport of such a recognizance, unless he be guilty of some wilful breach of the peace. Hawk. Pl. C. 131. cap. 61. l. 27.

* [429]

(G. 2) *Entry into Land.*

[1.] [2. **A** Man may justify the battery of another, in defence of his possession. Trin. 3 Jac. B. demurred in law. *One may justify an assault and battery in defence, or for the preservation of his possession of lands or goods.* 2 Inst. 316.

[2.] [3. If a man comes into the forest in the night, the forester cannot beat him before resistance made by him. Mich. 14 Jac. in the Star-Chamber, resolved by the chancellor and judges in **HASTOCK'S CASE**, and Hastock had recovery against him at the common law in action of battery.]

[3.] [4. But if the party, who comes so into the forest, resists the forester, he may justify the battery of him, as was agreed in the case aforesaid. *The statute of malefactors in parks, of 21 E. 1. gives as much. See the statute of 21 E. 1.*]

[4.] [5. A man cannot justify a wounding in preservation of his possession. P. 12 Ja. B. R. between * **BUTLER AND AUSTIN**; per Curiam. Mich. 9 Car. B. R. between **BUCKHURST AND TROWTE**, adjudged upon demurrer. Intratur Trin. 9 Car. Rot. 472.] **S. C. and S. R. But per Coke Ch. J. he may justify wounding in defence of his person. Roll. Rep. 19. pl. 20.*

[5.] [6. If a man be making a booth in a fair by good licence of the owner, and a stranger disturbs him, and breaks it down without cause, yet he cannot justify the battery of him. 11 H. 6. 23]

[6.] [7. A man may justify the battery of one who will enter into his house; for it is his castle. P. 7 Ja. B. **LAWRENCE'S CASE**, per Curiam.] *Noy said, that a man cannot justify the wounding*

another to save his house or goods, but can only stay the party with his hands in defence of his possession. Lat. 20. in case of Hall v. Gerard.

A man cannot justify an assault in defence of his house or close. 1 Salk. 407. per Cur. in case of Leeward v. Basilec. — Ld. Raym. Rep. 62. S. P. accordingly, per Cur. in S. C.

[7.] [8. If a man enters into my close, and there with an iron sledge and bar breaks and displaces my stones there being in the land, being my chattle, and I require him to desist, and he refuses, and speaks threatening words, if I shall approach to him, and upon this I, to keep him that he shall not do more damage to the stones, not daring to approach him, cast some stones at him molliter & molli manu, and they lay upon him molliter, yet this is not good justification; for the judges said, that a man cannot cast stones molliter, though it was confessed by a demurrer; and it would be perilous there to give liberty to a man to cast stones out of his hand in defence of his possession; for when a stone is cast out of the hand, he cannot guide it; and a justification of battery in defence of possession, though it arises from the possession, yet the conclusion is in defence of the person. P. 11 Car. B. R. between **COLE AND MAUNDER** adjudged upon demurrer. Intratur H. 10 Car. Rot. 502.] [430]

† Feb. 147.

8. There is a force in law, as in every trespass quare clausum fregit; so if A. enters into my ground, I must request him to depart, before

before I can lay hands on him to turn him out; for every impositio manuum is an assault and battery, which cannot be justified on the account of *breaking my close in law*, without a request to be gone. And likewise there is an *actual force*, as in burglary, in breaking open a door or gate; and in that case it is lawful to oppose force to force; and if A. *breaks down the gate*, or comes into my close vi & armis, I need not request him to be gone, but may lay hands on him immediately, for it is but returning *violence with violence*; per Cur. 2 Salk. 641. pl. 12.—Annæ, B. R. Green v. Goddard.

(G. 3) In Defence of Goods.

Ow. 150. [1.] [9. A Man may justify the battery of another, in defence per Coke, in of his goods. * 19 H. 6. 31. b. Trin. 3 Jac. B. case of Seaman v. Cuppledike.] agreed.]

———— I may lay hands on one that would take my goods, and disturb him, and if he will not leave, I may beat him, rather than he shall carry them away. Fin. Law, 8vo. 203.

* S. P. Br. Trespass, pl. 128. in the large edition, cites 29 H. 6. 31. but it should be 19 H. 6. 31. and so are the smaller editions. — 2 Inst. 316. S. P.

If A. comes forcibly and takes away my goods, I may oppose him without any more ado; for there is no time to make a request; per Cur. 2 Salk. 641. pl. 12. Ann. B. R. Green v. Goddard.

[2.] [10. If a man will take my money out of my purse, I may justify the battery of him in defence thereof.]

The defend- [3.] [11. If a man takes the beasts of another damage feasant to ant came manu forti his corn, and a stranger will take them out of his possession, he so rescue a distress may well justify the battery of him in defence of them. from the 19 H. 6. 66.]

plaintiff, and it appeared, that the plaintiff had not time to request him to forbear, and this being pleaded was held a good justification of the assault. 11 Mod. 64. pl. 6. Trin. 4 Ann. B. R. Anon.

4. A man may justify a battery to preserve his dog. Arg. Saund. 84. in case of WRIGHT v. RAMSCOT, cites Rast. Ent. 611. pl. 10.

[431] 5. In assault, &c. the defendant pleaded son assault demesne. The plaintiff replied that he was servant to A. to take care of his horses, and that the defendant would have beaten one of them; whereupon he, in defence of the horse, laid his hands on the defendant, and thereupon the defendant assaulted him. The defendant rejoined, that B. another servant of A. was going to break the hedge, and leap a horse of A.'s into Black Acre, a close of the defendant's master, whereupon the defendant forbid him, and endeavoured to hinder him; and thereupon the plaintiff came up and assaulted, &c. the defendant, who defended himself; and traversed, that he was guilty, &c. but in Black Acre, &c. Exception was taken to the replication, that it was only that the defendant would have beaten the horse, and did not allege in fact, that he did beat him. But notwithstanding this exception, the defendant had judgment. 2 Lutw. 1481. Hill. 11 W. 3. Shingleton v. Smith.

(G. 4) *Affault and Battery. Declaration. Good or not.*

1. **TRESPASS** of assault, that *he imposed such and so many threats of his life and maiming him, that he could not go about his business in public; and did not say about his business there, and yet well; per Cur. Br. Brief, pl. 230. cites 37 H. 6. 2, 3.*

2. In trespass the plaintiff counted, that the defendant menaced him, by which his business in this county and in the county of S. was not done, and shewed how, viz. in collecting rents, &c. repairing such houses, &c. And the same where he says, that he dared not attend his business, he shall shew in what business. Br. Count, pl. 46. cites 37 H. 6. 19.

3. In trespass of assault at D. & ipsum verberavit vulneravit, & male tractavit, all shall be intended in the first place; and yet it may be, that it was at divers places. Br. Surmise, pl. 27. cites 5 H. 7. 17.

4. In trespass of assaulting him, *nec non unum equum pretii 6 l. a persona ipsius* (the plaintiff) *ad tunc & ibidem cepit.* After a verdict it was moved in arrest of judgment, that the declaration was ill, because the plaintiff did not suppose any property in the horse, but *ought to have said equum suum*; for it might be the defendant's, and then he might lawfully take her; or it might be the plaintiff's and then tortious: and the construction being indifferent, it shall be taken strongest against the plaintiff. And the jury having assessed intire damages for both trespasses, and there being no cause for one trespass, the verdict is not good; *quod fuit concessum per Fenner & Yelverton J. no other being in court. Yelv. 36. Pasch. 1 Jac. B. R. Purcel v. Bradley.*

5. In action of assault, the plaintiff declared *quod cum the defendant verberavit, without an express allegation* that the defendant did beat him. Exception was taken, and cited the case of **SHERIFF AND BRIDGES**, 39 Eliz. where such a declaration was adjudged void. But the justices were of opinion, that the declaration was good, notwithstanding the judgment cited. Godb. 251. pl. 347. Pasch. 12 Jac. B. R. Sherloe's case.

Roll. Rep. 55. pl. 30. S. C. by the name of **SHERLAND v. HAVTEN**; and Coke Ch. J. seemed to think it

good, and instanced in an ejectment; and also in debt for rent, that a *quod cum dimisit* is good. But it being moved at another day, and the case of **SHERRENE v. BRIDGE**, Trin. 37 Eliz. cited as adjudged in point in a writ of error to be good, though the custom is to declare in such cases with a *de eo quod ipse*, &c. the Court (absente Coke) held accordingly. — 2 Bulst. 214. S. C. and the whole Court declared they would be directed by precedents, and accordingly precedents were produced, and all (absent Coke) were clear of opinion that the declaration was not good. And Man secondary, informed the Court, that he had 2 precedents directly in point adjudged upon a declaration to be insufficient, being in this manner as here with a *quod cum*. But Croke J. said, if the declaration here had been *quod cum*, he was in pace domini regis, the other did assault and beat him contra pacem, this had been good; for here is a good relative to the *quod cum*, which always pre-supposes some matter subsequent to be depending upon it, which is not so here, and therefore the declaration here not good; and so the rule of the Court was *quod querens nil capiat per billam*.

6. After verdict, judgment was arrested, because *no place was alleged where the battery was done.* Lat. 273. Mich. 2 Car. **Eufol v. Bengor.**

7. Upon

7. Upon hearing counsel on both sides, 3 *declarations in assault; battery, and false imprisonment*, were ordered to be reduced into one, appearing upon the face of the declaration to be all for one and the same fact; and in each of the 3 the plaintiff declaring against one of the defendants for an assault, &c. Simul cum the other 2. Notes in C. B. 249. Hill. 7 Geo. 2. Catlin v. Elliot, Hunt, and Drew.

(G. 5) *Pleadings. Good or not.*

1. **TRESPASS** of battery, wounding and maihem, and it was demanded judgment if the writ, *inasmuch as of the maihem he ought to have appeal of maihem*, et non allocatur. Br. Trespass, pl. 261. cites 43 Aff. 39.

Br. Appeal, pl. 138. cites S. C. —

Serjeant Hawkins says that howsoever

2. By which the defendant said, that the plaintiff at another time brought appeal of maihem of the same act, and was nonsuited after appearance; and good clearly per Knivet Ch. J. and so see that nonsuit in appeal of maihem is peremptory. Br. Trespass, pl. 261. cites 43 Aff. 39.

the law may stand in relation to this matter; if such action be brought for the battery only, without mentioning the maihem, he sees not how it can be barred by such a nonsuit, because it is generally holden, that in an appeal of maihem, no consideration can be had of the battery, but only of the maihem; and if so, it seems strange that a nonsuit in such an appeal should bar an action of a different nature brought from a matter which the appeal had nothing to do with. However it seems clear that a nonsuit in an action of trespass is no bar of an appeal of maihem; also he takes it for granted, that a nonsuit in an appeal of maihem, before the plaintiff has appeared to it, is not a bar of any other appeal or action, because the writ, for what appears to the contrary, might be purchased by a stranger in the name of the plaintiff. 2 Hawk. Pl. C. 160. cap. 23. s. 26.

Br. Presentments in Courts, pl. 4. cites S. C. * All the editions of Brooke are (defendant), but the Year-book is (plaintiff).

3. In trespass, the defendant said that he was forester of the forest of B. and the * plaintiff was indicted by the foresters and verderors, regards, and agisters, for taking of deer, by which he came to him, and prayed him to find pledges to answer before the justices of the forest, and would not; by which he took and imprisoned him till he performed the statute, judgment, &c. And the plaintiff said, that de son tort demesne absque tali causa, and the issue was received by the Court. And it was said, that before justices in eyre, he shall not have averment contrary to such presentment of the foresters. Br. De son tort, &c. pl. 7. cites 45 E. 3. 7.

4. Trespass of battery, the defendant pleaded *not guilty*, the plaintiff pleaded *estoppel*, because at another time the defendant being indicted, owned the trespass before justices of peace; and upon this process issued against him to answer to the king, who came and pleaded that the ill which the plaintiff had, was de son assault demesne, and so to issue; and before verdict the defendant came and confessed the trespass, and put himself in grace of the king, and made fine, and demanded judgment, if he shall be received to plead not guilty; and the record came in by writ of the Chancery: and the Court held that he shall not plead not guilty, contrary to his confession, by which he pleaded de son assault demesne. And the other demurred, inasmuch as he pleaded it against the king, and after waived it, and confessed the trespass. And after writ

was

was awarded to inquire of damages; and so it seems that he shall not plead contrary to his confession. Br. Trespafs, pl. 96. cites 11 H. 4. 65.

5. Trespafs of assault and battery; the defendant said that the plaintiff came upon his land, and would have occupied it, and the defendant disturbed him, and took him by the hand, and charged him to go ffo; which is the same assault and battery; and admitted for a good plea. Br. Trespafs, pl. 413. cites 11 H. 6. 23.

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6. Trespafs of battery of his servant, per quod servitium servientis sui prædicti, &c. the defendant said, that he was retained with him before that he beat him, and departed and came to the plaintiff; and yet it seems that it is no plea; for he cannot retake him, nor beat him, without request to his second master. Br. Trespafs, pl. 139. cites 21 H. 6. 8. 8.

7. Trespafs of breaking his close, and battery, menace, and wounding A. and B. his servants in N. The defendant said, that he was seised of 2 acres on C. till disseised by the plaintiff, upon which he entered and did the trespafs, absque hoc, that he is guilty in N. and a good plea; and to the wounding not guilty; for per Cur. wounding cannot be justified; and to the menace and battery said, that he was seised of the said 2 acres in C. till by the plaintiff disseised, and the said A. and B. servants of the plaintiff, came with the plaintiff upon the land, and the defendant re-entered upon the plaintiff, and found A. and B. upon the land occupying to the use of the plaintiff, by which he put his hands upon them peaceably, and said, that if they would not go off the land, he would pursue and chastise them according to the law of the land; which is the same menace and battery, of which the action is brought, absque hoc, that he is guilty at N. And a good plea without the traverse: for it is a trespafs transitory. Br. Trespafs, pl. 143. cites 21 H. 6. 26, 27.

Trespafs of assault made to his servants at D. The defendant said, that the said servants of the plaintiff were cutting of the grass of the defendant in C. by which he prohibited them, and laid his hands upon them, and commanded them to go out of his

land, absque hoc that he is guilty of an assault in D., &c. And it was held a good plea; and yet it is not like where a man justifies by assault made by the plaintiff to the defendant; note the diversity. Br. Justification, pl. 4. cites 27 H. 6. 1.

8. In trespafs of assault in the county of N. by which he lost his business in the county of N. and S. it is no plea that he had not any business, or did not loose his business in the county of S. Br. Traverse per, &c. pl. 136. 17 H. 6. 2, 3.

S. P. Br. Count, pl. 45. cites S. C. and pl. 89. S. C.

9. And if he says that by the menace of the defendant he could not gather in his debts, nor plow his land in S. it is no plea that he has no debts there; for the assault or menace is the effect of the matter, and the rest is only to increase damages. Br. Traverse per, &c. pl. 136. cites 37 H. 6. 2, 3.

S. P. Br. Count, pl. 89 cites S. C. But he shall answer to the menace.

10. Trespafs by F. for assault upon M. his servant, and beating and wounding him, 5 August anno, &c. and imprisoning him, and carrying him from L. to N. and there imprisoning him by 3 days per quod servitium, &c. perdidit; the defendant said, that 4 August he was robbed of such goods, to the value, &c. at midnight, by which he levied the cry, and came to D. constable of S. and to W. N. bailiff of the hundred, and shewed the matter, and prayed them to search for suspicious persons, and take and arrest them; by which they there searched

And after he said that he, as servant of the constable, and by his command arrested him, &c. and said, that he could not be carried atjue

corporis periculo, which is as well as *absque mortis periculo*, quod nota; and the same upon a return of *languidus*. Br. Trespass,

297. cites 2 E. 4. 8.

searched accordingly, and found the said servant going and watching suspiciously in the street, in the night, and would have arrested him, and he fled, and the defendant pursued, took, and carried him to H. to have him carried to gaol; and because he was sick, and could not be carried, they held him for 3 days, and after carried him to gaol; which is the same assault, battery, and imprisonment, &c. And no plea, because he makes not any justification for himself. Br Trespass,

pl. 297. cites 2 E. 4. 8.

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11. In trespass, the defendant shewed that the plaintiff would have taken 6d. of the money of the defendant from him, and he put his hands upon him, and did not suffer him. And by the Justices, if a man takes my goods, I may put my hands upon him, and disturb him, and if he will not leave, may beat him rather than suffer him to carry them away, by which the plaintiff said that *de son tort demesne absque tali causa*; and this was of trespass of battery. Br. Trespass, pl. 185. cites 9 E. 4. 28.

12. Trespass of menace, the defendant said that the plaintiff was indebted to him, and he said to him that he would sue for it by the law, and imprison him if he could, which is the same menace. And per Cur. this is no plea; for the one is a tortious menace, and the other is a lawful menace. Br. Trespass, pl. 388. cites 16 E. 4. 7.

Br. Trespass, pl. 389. cites S. C.

13. Trespass *vi & armis* in *D. insultum fecit, verberavit vulneravit, & male tractavit, & tales, & tantas minas imposuit quod, &c.* the defendant to the *vi & armis* pleaded not guilty, and to the residue of the trespass that at the time of the trespass, &c. the plaintiff made an assault upon him, and the defendant prayed him to suffer him to be in peace, and if not, that he would defend himself, and rather than he should beat the defendant, that the defendant would meet him, and yet the plaintiff would not surcease his assault, by which the defendant in his defence beat him, which is the same assault and menace of which the action is brought; and a good plea, and shall not be compelled to say generally, that *de son assault demesne*, and in his defence; for then the menace shall not be answered; quod nota per Cur. Br. Trespass, pl. 333. cites 16 E. 4. 11.

14. In trespass of assault and battery, the defendant said that divers felonies were committed in the place where, &c. and said that he was watching in his house, and came out into the highway, and the plaintiff came at the hour of 11 in the night, and the defendant came and put his hands upon him in a peaceable manner, and locked in his face, and when he saw that he was a true man, he departed, which is the same assault and battery of which, &c. Per Keble, by the statute of Winchester, cap. 3. watchmen may arrest night-walkers, but such watches ought to be assigned by the vill. And per Cur. suspicion is sufficient cause to arrest a man, and is traversable. And per Husley, watchmen may oppose nightwalkers from whencesoever they come; and Fairfax J. agreed thereto, and so a good plea. Quære if double. Br. Trespass, pl. 268. cites 4 H 7. 1, 2.

15. Trespass of assault, battery, and wounding, the defendant said that the same place and day he had a warrant to arrest the plaintiff,

plaintiff, by which he there put his hands upon him peaceably, and arrested him, which is the same assault, battery, and wounding, &c. Per Fineux, this is no plea; for *this is no assault, battery, nor wounding*; but if he had said that he arrested by a warrant at the time, &c. and the plaintiff made assault upon him, and the ill which he there had, &c. was de son assault demesne, &c. this had been a good plea. Br. Trespas, pl. 218. cites 21 H. 7. 39.

16. In trespass of assault, battery, and wounding, the defendants justified by warrant from the mayor of S. to take the husband, and that when they were taking him, the wife hindered them, whereupon they laid their hands on her molliter to make her desist, *quæ est eadem transgressio*, &c. It was objected that they did not answer to the battery, nor traverse it. And it was held ill. Cro. E. 93, 94. pl. 3. Pasch. 3 Eliz. B. R. Jerome v. Phear.

17. In assault, battery, and wounding, the defendant pleaded that he was constable of D. and for such a misdemeanor by the plaintiff, he laid his hands on him and put him into the stocks, *quæ est eadem transgressio*; and upon demurrer it was adjudged for the plaintiff, because the defendant did not plead not guilty to the wounding, or justified it; but if one pleads that the hurt which the plaintiff had was of his own assault, this is a good answer to all, and the plaintiff had judgment. Cro. E. 268. pl. 3. Hill. 34 Eliz. B. R. Pendlebury v. Elmer.

18. A boy pressed to get into a cock-pit, to see the game, and the master of the pit endeavoured to put him forth; the boy resisted, the master thereupon pulled him by the ear, so that it bled; and the boy by his guardian sues action of battery. And the master pleaded not guilty, and for this it was against him; but by Dampart Judge, some opinion was, that by good pleading in this case the master of the pit might have justified the act well enough, but could not plead not guilty. Clayt. 24. pl. 41. Rigg's case.

19. In assault and battery, the defendant justified by molliter manus imposuit upon the plaintiff, who entered his close. And the opinion of the Court was, that he ought to shew what estate he had in the close, and that the plaintiff came there and endeavoured to eject or disseise him. Mo. 846. pl. 1142. Mich. 13 Jac. Smith v. Bull.

20. If a battery be outrageous, so that a molliter manus imposuit be not true, it ought to be specially shewn, otherwise it shall be a good justification. Skin. 387. pl. 22. Mich. 5 W. & M. B. R. King & Uxor v. Tebbart,

21. In trespass and assault the defendant pleaded that he was riding in the highway, and his horse being feightened, ran away with him, and that the plaintiff and others were called to to stand out of the way, which they did not, and that the horse run upon the plaintiff against his will, &c. And upon demurrer to this plea it was adjudged ill, because the defendant had justified a trespass, and did not confess it; but if he had pleaded not guilty, upon this evidence he might have been acquitted. 2 Salk. 637. pl. 5. Pasch. 7 W. 3. B. R. Gibbon v. Pepper.

4 Mod. 404. S. C. adjudged for the plaintiff; and there it was said not to be like the case of *WEAVER v. WARD*, in Hob. 134. because there the

fact was confessed; but the battery is not answered here. ———— Ld. Raym. Rep. 38. S. C. and says that in this case the defendant justified a battery, which is no battery. And so was the opinion of the Court; and judgment for the plaintiff.

22. One cannot plead his possession in bar *without more*, except it be in the case of battery, where it may be *merely collateral*; and the true *diversity* is between a *declaration* and a *plea*, for one may count upon his possession without more, but not justify by virtue of it; and you can never give possession in bar, without making a title; per Powell J. 12 Mod. 508, 509. Pasch. 13 W. 3. in case of Pell v. Garlick.

2 Salk. 423.
pl. 11. S. C.
but not S. P.
—6 Mod.
240. S. C.
but S. P.
does not ap-
pear.—11
Mod. 38. pl.
2. S. C. but
not S. P. of
the disconti-
nuance.

23. In trespass an exception was taken, that the plea was discontinued, because the declaration was of an *assault, taking, arresting, and imprisoning*, and the defendant pleaded to the trespass, assault and imprisonment, but *pleaded nothing as to the arrest*. But per Holt Ch. J. the *imprisonment includes the arrest*; for imprisonment cannot be without an arrest, nor an arrest without imprisonment; for an arrest is an actual imprisonment. And the plaintiff had judgment. 2 Ld. Raym. 1100. Hill. 3 Ann. Blackmore v. Tidderley.

24. In trespass, assault and battery, *laid 1st Octob. 3 Ann.* the defendant as to the force pleads not guilty, and as to the residue pleads that long before, &c. (viz.) on September 13, a stranger's bull broke into his close, which he was driving out to impound him; and that the plaintiff came into the close, and with force hindered him, and would have rescued the bull; to prevent which the plaintiff *parvum flagellum super querentem molliter imposuit*, which is the same residue of the trespass, and traversed that he was guilty at any time before the said 13 Sept. Exception was taken, because the defendant should have required him to go out of his close before he beat him, and that *flagellum molliter imponere* was repugnant, and that the traverse was short, because it did not answer the trespass after Sept. 13. per Cur. The quod est idem residuum is good without a traverse, and therefore not material though it be short; for it goes only to the time where the quod est idem avers it to be the same. 2 Salk. 644. pl. 12. . . . Ann. B. R. Green v. Goddard.

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25. In assault and battery, the defendant *pleaded that he was servant to R. and that the plaintiff having assaulted R. at a certain time and place, he did then and there assault the plaintiff in defence of his master*. Exception was taken that a servant could only justify defending his master, and not assaulting the plaintiff in the defence of him; and cited 11 H. 6. 8. Besides the assault of [by] the plaintiff might have been of a time past; for the words of the plea are, that the plaintiff *having assaulted R.* And the whole Court (absente Lee) were of opinion that the plea was not good, and gave judgment for the plaintiff. 2 Barnard. Rep. in B. R. 327. Mich. 7 Geo. 2. 1733. Markweth v. Reynolds and Westwood.

(G. 6) Justification. Good, or not.

1. **I**N trespass of battery at D. there, if he justifies at another place in the same county, this is good without alleging continuance of the trespass; per tot. Cur. Br. Trespass, pl. 37. cited 35 H. 6. 50, 51.

2. In

2. In trespass of battery, *ita quod desperabatur, &c.* it suffices to justify the battery, without answering to the jeopardy of life. Br. Faux Imprisonment, pl. 3. cites 35 H. 6. 54.

3. Trespass of battery, the defendant said that he is serjeant, and arrested him upon an action, and pleaded all certain; and the plaintiff made rescous, and the serjeant pursued him, and he fled, and because he could not otherwise take him he beat him, which is the same trespass, &c. Per Littleton, if I come to distrain, and the party chase the cattle upon another's land, or into another county, I may pursue and retake; for when they are in my view they shall be adjudged in law in my possession; the reason seems to be inasmuch as they are transitory. So where it is said to a man, I arrest you, and he flies, I may pursue him and take him, and this in another county. Per Markham Ch. J. yet you cannot beat him when he flies; but if he had been arrested in fact, and made rescous, or would stand in his defence upon the arrest, there he may beat him to take him. Br. Trespass, pl. 296. cites 2 E. 4. 6.

4. Trespass of menace of life and member; a man cannot justify the menace of death; by which he said not guilty, and to the rest said that he menaced him from going in his way, and made assault upon him; by which he said to him that he would go in his way, and would defend himself in their assault, and rather than be maybemed himself that he would maybem him; and so to issue. Br. Trespass, pl. 319. cites 10 E. 4. 6.

5. Trespass of assault, wounding, and imprisonment by one day; and the defendant justified the wounding because the plaintiff made an assault upon him the same day, year, and place, and the wrong which he had was de son assault demesne in his defence; and to the imprisonment he said that he was constable of the same vill, and because the plaintiff made an assault upon him and broke the peace, he took and carried him to gaol for conservation of the peace; and a good plea per tot Cur. though the assault was made upon himself. Br. Trespass, pl. 272. cites 5 H. 7. 6.

6. In trespass for an assault, wounding, taking, and imprisoning, the defendant quoad the assault and wounding pleaded not guilty, and quoad the taking and imprisoning justified by a warrant from the lord mayor, but shews neither time or place when or where it was made, and said nothing as to the assault; and upon demurrer the plea was held ill, by reason of * omitting the assault; and so it was a discontinuance, and therefore ordered to begin again. 2 Bulst. 335. Hill. 12 Jac. Wilson v. Dodd.

Roll. Rep. 135. pl. 15. S. C. accordingly. And per Cur. A place ought to be alleged where the warrant was made. And ibid.

176. S. C. accordingly, and the point as to the place was admitted by Coventry of counsel for the defendant. It was insisted by the counsel for the plaintiff, that where the things to be answered are of divers natures, there ought to be a particular answer to each; but where the one includes the other, it is well enough, if he justifies that which includes the other without answering the other, and so in this case; for there cannot be an imprisonment without an assault, so that the imprisonment which is justified includes the assault; but Coke Ch. J. said that there might be an assault without an imprisonment, and so they are distinct, as wounding includes an assault; but if he directs his plea to the wounding, it is no answer to the assault. And Doderidge said the plaintiff did not intend the assault comprehended by implication in the imprisonment, but another distinct assault.

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7. It was objected, that the traverse de injuria is not good, where the justification is by reason of a freehold, or a lease for

years; but notwithstanding the plaintiff shall have judgment, because the justification is *not merely in the realty, but mixed with the personalty*; and where it is mixed with the personalty, injuria sua propria is a good traverse, and he need not to traverse the title, as the defendant pretends; and cites 8 H. 6. 34. Besides, the justification is not here upon the lease, but upon the assault upon him by laying his hands molliter upon him, to remove him from his possession; so that the realty is not *inducement only to the justification*. Lat. 273. Pasch. 2 Car. Hall v Gerrard.

Ibid. 404.
The reporter says, quod mirror! For that all justifications in such cases are as here, and the laying on his hands is a

8. In trespass of battery and imprisonment, the defendant *justified as bailiff, by virtue of an execution, and that he molliter manus imposuit* upon him, and arrested and imprisoned him. It was objected that the molliter manus imposuit *did not answer the battery*; and the Court inclined that it did not sufficiently answer it, but that he should have pleaded that the plaintiff resisted him, by which he in his defence beat him. 3 Lev. 403, 404. Mich. 6 W. & M. in C. B. Patrick v. Johnson.

battery, if he had no warrant to justify it. And ibid. 405. says, that upon this exception and another curia advisare vult; and the plaintiff being satisfied that the exceptions would not help him, discontinued. — But see 2 Lutw. 929. where this remark of Lev. 404, 405. is canvassed and denied by Sergeant Lutwich in the same case of Patrick v. Johnson.

9. Where an *express battery is laid*, it is not enough to justify the imprisonment upon legal process, which includes a battery, but the defendant ought to go on, and *show that he arrested the plaintiff, and the plaintiff offered to rescue himself, and so the defendant was compelled to beat him*; for otherwise if it be not upon some occasion, a man cannot justify a battery in an arrest. And judgment was given by the whole Court for the plaintiff. Ld. Raym. Rep. 231, 232. Trin. 9 W. 3. in case of Truscott v. Carpenter and Man.

Sec (G. 5). (G. 7) *De son tort Demesne. Good Plea, in what Cases of Assault and Battery, &c.*

1. **I**N trespass of menacing, it is no plea *de son tort demesne, &c.* for if a man assaults another, it is not lawful for the other to say that he would kill him, and to menace him of life and member; but if he, upon whom the assault is made, flies, and the other pursues him so near that he cannot escape, or if he has him under him upon the ground, or has chased him to a wall, hedge, water, or dike, so that he cannot escape him, there it is lawful for him to say, that if he will not depart, he in salvation of his life will kill him, &c. Per Prisot, quod non negatur. And Brooke says such manner of form is good se defendendo in an indictment upon the death of a man se defendendo. Br. Trespas, pl. 28. cites 33 H. 6. 18.

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But where a man justifies so as to arrest N. for suspicion of felony, the plaintiff

2. In trespass the defendant *justified to see if waste be done in the land which the plaintiff held in execution against the defendant by statute merchant*; and the plaintiff said that *de son tort demesne absque tali causa*. And per Brian, where a man justifies his entry by the law, and by no person certain, as to enter to see waste, entry into a tavern for victual, or the like, there *de son tort demesne*

mesne is no plea, by which the plaintiff waived the issue, and said that he claimed the land to be his own land; and a good issue. *Br. De son tort, &c. pl. 49. cites 12 E. 4. 10.*

may say that
de son tort
demesne,
&c. and yet
he justified

by the law; for the one is an entry, and the other is an excuse in law. *Br. De son tort, &c. pl. 49. cites 12 E. 4. 10.*

And it was said there, that if a man justifies by authority of the plaintiff, as by licence, lease, or such like, there de son tort demesne absque tali causa is no plea. *Br. De son tort, &c. pl. 49. cites 12 E. 4. 10.*

3. In trespasss of assault and battery, the defendant justified that J. S. was possessed of a dog *ut de bonis propriis*, and delivered it to him to keep, and that the plaintiff would have taken it from him, in which he resisted him, and in defence and custody of his dog he beat him, and the hurt which he had was de son tort demesne; and to this the plaintiff was put to answer, and replied *de son tort, &c.* which proves a property in the dog when he justifies the beating of one in defence of it. *Arg. Cro. E. 126. in case of Ireland v. Higgins, cites 13 H. 7. Rot. 35.*

4. Where defendant in trespasss, assault, battery, &c. justifies in defence of his possession, the plaintiff may reply *de son tort demesne*, because the title of the land does not come in question; per Powell J. *Ld. Raym. Rep. 120, 121. Mich. 8 W. 3. Serle v. Darford.*

(G. 8) *De son Assault Demesne*, a good Plea. In what See (G. 5); Cases.

1. **I**N trespasss of battery, the defendant said that the plaintiff beat W. to death, and the constable came to arrest him, and he stood in defence, by which the defendant came in aid of the constable, &c. and the ill which he had was de son assault demesne; judgment, &c. The plaintiff said that de son tort demesne, &c. *Br. De son tort, &c. pl. 11. cites 38 E. 3. 9.*

2. Battery against two defendants; they pleaded son assault demesne, and this was assigned for error, because the assault of the one could not be the assault of the other; and therefore they ought to have pleaded several pleas, but it was adjudged good, because the assault may be joint. *Mo. 704. pl. 983. Penruddock v. Errington.*

3. Though one cannot justify a battery by son assault demesne, by pleading it to an indictment, yet he may give it in evidence on a not guilty, and he may be thereupon acquitted; per Holt Ch. J. *6 Mod. 172. Pasch. 3 Ann. B. R. the Queen v. Cotsworth.*

4. In trespasss for an assault, battery, and maihem, defendant pleaded son assault demesne, which was admitted to be a good plea in maihem; but the question was, what assault was sufficient to maintain such a plea in maihem? Holt Ch. J. said that the meaning of the plea was, that he struck in his own defence; that if A. strike B. and B. strikes again, and they close immediately, and in the scuffle B. maims A. that is son assault; but if upon a little blow given by A. to B., B. gives him a blow that maims him, that

11 Mod. 43.
pl. 3. S. C.
accordingly;
and Holt
said that if a
man strikes
another who
does not re-
sent it im-
mediately
after, but

takes his opportunity, and some time after falls upon him, and beats

him, in this case son assault is no good plea, but in such case he ought to plead what is necessary for a man's defence, and not who struck first, though this he said had been the common practice, but which he wished was altered; for hitting a man a little blow with a little stick on the shoulder, is not a reason for the other to draw a sword, and cut and hew the other, &c. And the principal case was, that the plaintiff in a scuffle ran his finger towards the defendant's eye, who bit off a joint.—S. C. cited Ld. Raym. Rep. 177. in a note at the end of the case of *COOK v. BEAL*, says that Holt Ch. J. directed a verdict for the defendant, the first assault being the tilting a form or seat upon which the defendant sat, whereby he fell, and the maihem was that the defendant bit off the plaintiff's finger.—6 Mod. 230. & 263. S. C. but upon other points.

is not son assault demesne. Powel J. agreed, for the reason why son assault is a good plea in maihem is, because it might be such an assault as endangered the defendant's life. 3 Salk. 642. pl. 13. Pasch. 3 Ann. B. R. Cockcroft v. Smith.

(G. 9) Replication in Assault, &c. Good, or not.

Brownl. 215. S. C. and is much in the same words with that of Yelv.—Cro. J. 224. pl. 5. S. C. adjudged accordingly.

1. IN assault and battery, the defendant pleaded, that at the time, &c. he was seised of the rectory of D. in fee, and that corn was severed from the 9 parts, and he came into the ground to carry away the tythes, and in defence thereof, and to hinder the plaintiff from taking it, he stood there to defend it, and the hurt which he had was of his own wrong; the plaintiff replied, *de injuria sua propria absque tali causa*: and upon demurrer the plaintiff had judgment, because by his declaration, he did not claim any thing in the soil or in the corn, but only damages for the battery, &c. which is collateral to the title. Where the plaintiff makes title in his count, and the defendant pleads any matter in destruction of such title, or of the plaintiff's cause of action, there the plaintiff must reply specially, and shall not say *absque tali causa*. Yelv. 157. Trin. 7 Jac. B. R. Tailor v. Markham.

2. Trespass of assault, battery, and wounding, 1 Aug. 13 Car. the defendant pleaded son assault demesne, upon issue the defendant gave in evidence an assault and battery by the plaintiff, 2 July 13 Car. and that it was in his own defence, and produced witnesses to prove it; the plaintiff shewed that the battery he intended was 9 July 13 Car. and produced also divers witnesses to prove it. It was insisted for the defendant that this was no evidence; for the plaintiff ought to have made special replication, and shewed that special matter; but all the Court held that it was not requisite; for if he had shewed another day in the replication it had been a departure; but it is sufficient to shew it in evidence, that there was an assault; for the day is not material. Cro. C. 514. pl. 12. Mich. 14 Car. B. R. Thornton v. Lister.

Mod. 36. pl. 86. S. C. but somewhat varying, viz. The defendant pleaded de son assault demesne; the

3. In battery, the defendant pleaded son assault demesne; the plaintiff replied that he was standing at his gate, and that the defendant being on horseback offered to ride over him, whereupon he moliter assaulted the plaintiff in defence of his person, *qui est idem insultus*, &c. and upon demurrer this replication was adjudged ill, because he had now confessed the first assault; but he should have said *moliter manus imposuit upon the plaintiff to hinder his riding over him*.

Judg-

Judgment for the defendant. Lev. 282. Jones v. Trefillian. Hill. plaintiff replies, that the defendant

would have forced his horse from him, whereby he did molliter insultum facere upon the defendant, in defence of his possession. To this the defendant demurred. Moreton said, that molliter insultum facere is a contradiction; suppose you had said that molliter you struck him down. And Twisden said, you cannot justify the beating of a man in defence of your possession, but you may say that you did molliter manus imponere, &c. Keeling said you ought to have replied, that you did molliter manus imponere, quæ est eadem transgressio. And per Cur. Quer' nil capiat per billam, unless better cause be shewn this term. — Sid. 441. pl. 10. S. C. but states it that the defendant pleaded specially in defence of the possession of a ship, and concluded his plea et sic molliter insultum * fecit, where it should be manus imposuit; and therefore the bar was adjudged ill. — S. C. cited Ld. Raym. Rep. 62. Mich. 7 W. 3. in case of LEWARD v. BASLEY, as Trin. 21 Car. 2. Rot. 1841. but states it differently from all the rest, viz. that the defendant pleaded son assault demesne; the plaintiff replied that he was possessed of a close called Cupner's close; and that the defendant broke the gate, and chased his horses in the close, and the plaintiff for defending his possession molliter insultum fecit upon the defendant. And upon a demurrer adjudged a bad replication, for he should have said molliter manus imposuit; but he could not justify an assault in defence of his possession. And this case the Court agreed to be good law. — 2 Keb. 597. pl. 23. S. C. says the plaintiff replied that in defence of his body and possession molliter insultum fecit on the defendant, who came riding against him standing in his close; and the Court held it ill.

4. Assault, battery, and wounding. The defendant justified, that he being master of a ship, commanded the plaintiff to do some service in the ship; and on his refusing, he, the defendant, moderate castigavit eum. The plaintiff maintained his declaration, absque hoc quod moderate castigavit. After verdict for the plaintiff it was moved in arrest of judgment, that the issue was not well joined; for non moderate castigavit does not necessarily imply that he beat him at all, and so no direct traverse to the justification, which immoderate castigavit would have been; but de injuria sua propria absque tali causa would have been the most formal replication. However, it was held good after a verdict. Vent. 70. Pasch. 22 Car. 2. B. R. Aubrey v. James.

* [440]
Sid. 444. pl. 2. the replication was quod non moderate castigavit, and issue thereupon; and the jury found quod non moderate castigavit, and 20 l. damages. It was moved, that this was negativum

infinitum, and so not a good issue. And the Court held it would have been ill upon demurrer, but is good after verdict; because here is an affirmative and a negative. — Gilb. Hist. of C. B. 124. cites S. C. and says, that it was rather a traverse of the chastisement, than of the moderate manner of doing it; yet after verdict it is good, because the injuria has ascertained that he did beat him immoderately.

5. In trespass of assault and battery, the defendant pleaded son assault demesne. The plaintiff replied, that the defendant came into his house, and continued there after the plaintiff desired him to depart; upon which he commanded his wife to put him out of the house, quæ molliter manus super the defendant imposuit, & hoc, &c. but does not say quæ est eadem transgressio. And adjudged a good replication; for it being eodem tempore quo, it is good without such a conclusion; but if they vary in time, then it is necessary to say quæ est eadem transgressio. Skin. 387. pl. 22. Mich. 5 W. & M. in B. R. King & Ux. v. Tebbart.

Comb. 227. KING & UX. v. PEPHARD, S. C. It was insisted for the defendant, that there ought to be a traverse. But Holt Ch. J. said, the plaintiff by

the replication shews it was a justifiable assault, and so confesses and avoids, which is a full answer without a traverse; and where the replication is de injuria sua propria, it must conclude ad patriam. — Carth. 280. KING & UX. v. PHEPPARD, S. C. accordingly. And per Cur. the replication ought to be special as it is; because the matter could not be given in evidence upon the general replication of de injuria sua propria. And judgment for the plaintiff.

(G. 10) *Judgment and Damages, How. And where several Defendants plead several Pleas, and one or more is found guilty of the Battery, and the others of the Assault only.*

1. **TRESPASS** of assault and battery. They are at issue, and it is found that he assaulted him, but he had no hurt, and that he was not beaten; and taxed damages at half a mark, and the plaintiff recovered by judgment, Br. Damages, pl. 19. cites 42 E. 3. 7.

2. Trespas for assault *such a day*. The defendant pleaded not guilty. The jury found the assault on this day, and another day to the damage of 20 l. The plaintiff shall have judgment of the 20 l. for the assault; and it is taken as one and the same assault; quod mirum, and so judgment pro querente. Br. Damages, pl. 32. cites 45 E. 3. 24.

3. Trespas against 4, de verberatione & vulneratione. The one justified the wounding, and the blows by assault of the plaintiff, and are at issue. And the other pleaded not guilty. And per Cur. if the plea of him who justifies be found against him, he shall be charged of the entire damages; and it shall be inquired how the others did, for they may make an assault, and not wound him; and then of this the damages shall be against all, and of the wounding against him who struck only, quod mirum. For in trespass there is no accessory, and he who came and did not strike is principal, if the others struck. Br. Trespas, pl. 278. cites 6 H. 7. 1.

(H) Trespas. In what Cases it lies. *Clausum fregit, [Who shall have it. In respect of his Estate.]*

S. C. cited Mo. 302. pl. 453. Hill. 34 Eliz. in case of [1. **H**E that has only the herbage of a forest or of a close, may have trespass quare clausum fregit, as well as if he had the land. Dy. 12 El. 285. 40.]

Welden v. Bridgwater.—S. P. Ibid. 355. pl. 48. Pasch. 36 Eliz. per tot. Cur. in case of Hoe v. Taylor.—Co. Litt. 4. b. S. P. Arg. 2 Roll. Rep. 356. in case of Zouch v. Moore.

Mo. 302. pl. 453. S. P. by Fenner and Gawdy J. in case of Welden v. Bridgwater. [2. [So] If A, seised in fee of a close, grants the pasture of the close to B. for years, B. shall have trespass quare clausum fregit for a trespass done to him; for the close itself is demised to pasture, and not the pasture to be taken by the mouth of his beasts. Mich. 14 Car. by Barkley.]

—S. P. per tot. Cut. Mo. 355. pl. 480. in case of Hoe v. Taylor.—S. P. by Doderidge J. 2 Bulst. 88. in case of Whittier v. Stockman.

3. Trespas was brought by the lessor against the lessee for life for cutting of trees, which were reserved upon the making of the lease; and it lay well, though the lessee had a lease; therefore quare, if

if by the reservation the soil be not reserved, for it was *quare clausum fregit*, and awarded good by reservation of the great wood. Br. *Trespass*, pl. 55. cites 46 E. 3. 22.

4. Owner of land contracts with others for the *sowing it*, &c. *at halves*; the owner only can have *clausum fregit*. Le. 315. pl. 439. Hill. 20 Eliz. C. B. *Hare v. Okeley*. Cro. E. 143. pl. 10. Trin. 31 Eliz. C. B. S. C. *Hare's case*.

accordingly, by the name of *Hare & al' v. Okeley*.—Goldsb. 77. pl. 9. Hill. 30 Eliz. *Hare's case*.

5. *Trespass* was brought by grantee of the *proficuum* of such a mead, viz. the *ear-grass*. The jury found that *ear-grass* is such grass as is upon the land *after mowing till Lady-day*. Such grantee cannot bring *trespass quare clausum fregit*; but he may have action for spoiling his grass. 3 Le. 213. pl. 282. Mich. 30 & 31 Eliz. B. R. *Hitchcock v. Harvey*.

6. He that has the *crop and vesture* of lands as *lot acres*, to his lot every 3 or 4 years, shall have *trespass quare clausum fregit*. Mo. 302. pl. 453. Hill. 34 Eliz. *Welden v. Bridgewater*. Cro. E. 421. pl. 17. S. C. And this allotment having been

so made time out of mind, may be good by prescription; and by the allotment it is the proper soil and freehold of him to whom it is allotted, and so may well maintain this action.

7. So the king who has the *profits by outlawry*. Mo. 302. [442] pl. 453. Hill. 34 Eliz. in case of *WELDEN v. BRIDGEWATER*, cites 15 H. 7. 2. 34 H. 6. 28. So if a man be outlawed in a personal

action, and the king has the profits of the land, and lets the same to another, he shall have *trespass quare clausum fregit*; per Clench J. which Shute granted. 3 Le. 213. pl. 282. Mich. 30 & 31 Eliz. B. R. in case of *Hitchcock v. Harvey*.

8. *Partition* was made between *coparceners*, that the one shall have the manor of D. for one year, and the other the manor of S. and that every second year they shall exchange. Now each of them for their time have a several freehold, and shall have *trespass* alone *quare clausum fregit*. Cro. E. 421. pl. 17. in case of *WELDEN v. BRIDGEWATER*, cites F. N. B. 62. So partition, that the one shall have it from such a day to such a day, and the other for the residue of the year. Cro. E. 422. pl. 17. cites tempore E. 1. *Partition*, 21.

9. He that has a *profit apprender only*, and not the land itself, cannot maintain this action; as 5 H. 7. 10. he that hath a *warren* only in another's soil, or 15 H. 7. or 14 H. 8. of a *commoner* only. Arg. Cro. E. 421. in case of *Welden v. Bridgewater*.

10. *Tenant by copy of underwood to be cut annually by 4 or 5 acres*, may bring *trespass quare clausum fregit*, notwithstanding it was objected, that the soil was not granted, and which the Court admitted. Mo. 355. pl. 480. Pasch. 36 or 37 Eliz. B. R. upon error of a judgment given in C. B. *Hoe v. Taylor*. Cro. E. 413. pl. 3. Mich. 37 & 38 Eliz. B. R. S. C.—4 Rep. 30. b. pl. 23. S. C.—4 Mod. 186. S. C. per Cur. the like action was brought in 46 E. 3. 11. for fishing in libera pis-

11. *Trespass vi & armis, quare clausum vocat P. &c. fregit, and taking his fish in his free fishery in clauso predicto, &c.* It was objected that the action would not lie, for he is no more than a *commoner*, and has only a liberty of fishing with others, and not the entire fishing himself; for he has neither the property or possession of the fish in libera piscaria, but only a privilege of taking

caria; and it does not appear by the book, but the action was maintainable; but if it is a fault, it is cured by the verdict; and it shall now be intended that they were the plaintiff's own fish.

taking them there; and therefore cannot maintain trespass vi & armis, no more than he who has common of pasture. And Just. G. Eyres cited the case of *UP-JOHN v. DAWKINS*, where the like action was brought, and judgment arrested for the like cause; sed per Holt Ch. J. and Dolben, the plaintiff had judgment in Pasch. 1693. Eyre J. contra, and Gregory absent. Holt Ch. J. grounded his opinion upon the authority of the writ in the register, fol. 95. b. and F.N.B. 88. (G) but Dolben J. seemed to differ this case from the register, because here it was laid to be *libera piscaria in clauso (of the plaintiff) which amounts to separalis piscaria*. Carth. 285. Mich. 5 W. & M. B. R. Smith v. Kemp & al.

——— 2 Salk. 637. pl. 4. S. C. and Holt Ch. J. held as reported in Carth. But Salkeld says, note that Carthew (who moved in arrest of the judgment) said that there were several writs in the register against law.—Skin. 342. pl. 9. S. C. says that Holt likewise cited 17 E. 4. 6. where such writ was brought, and therefore the register, and F.N.B. being so, and the old book of 46 E. 3. 11. agreeing with it, they did not regard the cases cited, or 1 Inst. but gave judgment for the plaintiff; nisi.

Carth. 286. in the margin, cites 1 Inst. 122. a. Cro. Car. 553. and a case adjudged between *PRAX* and *TUCKER*, Hill 1 & 2 Jac. 2. B. R. where judgment was arrested upon the motion of Mr. Pollexfen for this very cause.

[443] (I) Trespass with Continuando. Of what Thing it may be.

So of grass fed. Br. Trespass, pl. 441. cites 20 H. 7. 2. per Cur.———* This should be (24).
[1.] T lies of *grass trampled*. 46 E. 3. * 14. 20 H. 7. 3. Carth. 29 E. 3. 35. 2 R. 3. 15. b. Fitz. Na. 91. (L.)]

Breaking of a gorce, house, &c. which are done in an instant, the plaintiff shall
[2. It does not lie of a *gorce*, for it cannot be continued. 46 E. 3. 24.]
[3. But it lies of a *house*. 46 E. 3. 34. 3 H. 6. Trespass, 19. Fitzh. Na. 91. (L) Dubitatur 20 H. 7. 3. contra 46 E. 3. 24. 19 H. 6. 23. b. admitted.]

not say transgressionem illam continuand', for these cannot be continued. Contrary of *grass fed*, &c. In the one case the justification refers to the day of breaking only, and in the other it refers to the continuance of the trespass. Per Finchden Justice. Br. Trespass, pl. 374. cites 46 Aff. 9.———S. P. Br. Nuisance, pl. 6. cites 46 E. 3. 23.

* S. P. Br. Trespass, pl. 441. cites 20 H. 7. 2. See pl. 9.

[4. So trespass lies of a *close broke* with a continuando. Fitzh. Na. 91. (L) contra 2 R. 3. 15. b.]

S. P. Arg. Raym. 228. in case of King v. ... cites S. C. and Mich. 20 H. 7. 3. pl. 7.———†
[5. A trespass with continuando is not good, *quare succidit & asportavit 10 arbores*, &c. for it cannot be continued for the same trees. M. 9 Car. B. R. between *HOSKINS* AND *JENNINGS*, per Curiam, and Littleton recorder of London, prayed leave to discontinue after demurrer joined. † 20 H. 7. 3.]
† Br. Trespass, pl. 441. cites 20 H. 7. 2. S. C.

S. C. cited Raym. 306. in the case of *Nappier v. Curtis*.

[6. A trespass of *corn in the blade* may be with a continuando *diversis diebus & temporibus* by 2 years, though there cannot be a continuance of such trespass by such time together. P. 5 Ja. B. KING's case,]

[7. A tres-

[7. A trespass of goods carried away, that is to say 2 load of wheat, and 5 load of barley may be with a continuando diversis diebus & vicibus from such a day to such a day. 21 H. 6. 43. a. b. adjudged.]

Br. Trespass
pl. 149. cites
S. C. —
It was re-
solved that
trespass

cannot be laid of loose chattels with a continuando, as 100 load of wheat with a continuando from such a day to such a day. And therefore per Powel J. no evidence can be given, but of the taking at one day. Ld. Raym. Rep. 242. in case of Foltheroy v. Aylmer.

[8. A trespass quare equum cepit, cannot be with continuando. 20 H. 7. 3. for this cannot be continued.]

Br. Trespass
pl. 441. cites
20 H. 7. 2.

S. C. — S. P. Arg. Raym. 228. in case of the King v. . . .

9. A man may have an action of trespass for breaking of his house or close, and allege a continuance of the trespass, and of the breaking thereof, from such a day unto such a day, as well as he may for treading of his grass, or cutting of his corn, &c. F. N. B. 91. (L).

Trespass for
entering his
house, and
coming there
divers days,
&c. and
after verdict

for the plaintiff, it was moved that the plaintiff had declared with a continuando for breaking his house, which he could not do; for the entering is one act done and ended at the going out again: and therefore if he re-entered it is a new trespass, and the continuando is only alleged for the aggravation of damages, and cited 2 R. 3. 15. 10 E. 3. 10. 16 E. 3. 24. That a continuando cannot be for breaking the house; but Doderidge and Houghton J. the rest being silent, thought it might be alleged with a continuando; for although it might be that if he went forth and re-entered, it should be a new trespass, but if upon his first entry he continued divers days, it might be alleged with a continuando, and cited F. N. B. 91. (L). Brownl. 223, 224. Trin. 10 Jac. in case of Sutcliffe v. Constable.

Where the trespass may be laid with a continuando, depends much upon the consideration of good sense; therefore where trespass is brought for breaking of a house or a hedge, this may be well laid with a continuando; for the pulling away of every brick is a breach, which may be done one at one day and another at another day, so one stick may be pulled out of a hedge one day and another another; but trespass cannot be laid with continuando for the prostration of a house; for when the house is once thrown down, it cannot be thrown down again. The same law of the throwing down of a hedge, per Treby and Nevil. But Powel J. was of opinion that a man may bring trespass for throwing down of a house with a continuando, because one part may be thrown down at one day and another at another. The same law of a † hedge. Resolved per Cur. Ld. Raym. Rep. 240. Trin. 9 Will. 3. in case of Fontleroy v. Aylmer.

† See pl. 11.

* [444]

10. In trespass of battery at D. in the county of Essex, the defendant pleaded that the plaintiff made an assault upon him at B. in the county of Kent, and the defendant fled, and the plaintiff pursued him continually unto D. aforesaid, at which place the defendant did defend himself, and so the hurt which the plaintiff had was of his own assault, and demanded judgment if action. The same is a good plea without traversing of the county; for a battery may be continued from one county to another. Arg. 1 Le. 39. pl. 49. Mich. 28 & 29 Eliz. in the Exchequer. In case of the queen v. Ld. Vaux, &c. cites 34 H. 6. 15, 16.

Br. Vifne,
pl. 6. cites
S. C. —
Br. De son
tort De-
meine, pl. 3.
cites S. C.

11. Trespass quare clausum fregit pedibus ambulando and breaking down his fences continuando transgression. præd. from such a day to such a day, ad damnum, &c. and after verdict upon non culp. it was moved in arrest of judgment, because there can be no continuando in breaking of fences. Et adjournatur. Raym. 228. Mich. 25 Car. 2. B. R. King v. . . .

Freem. Rep.
347. pl. 432.
King v.
Rose. Mich.
1673. seems
to be S. C.
but nothing
was said
there as to

this point; but Ibid. 356. pl. 448. Rose v. King says it was admitted that a general clausum fregit or domum fregit, lies not in continuance, for they are not continued acts. Per Cur; pedibus ambu-

ambulando lies in continuance, and so does eating his grass; and so in this case they resolved that breaking fences may well be in continuance, for a fence may be a mile long. *Jud' pro quer'.*

Trespass, *quod prostravit 20 perches of fence*, with a continuando. It was objected that it cannot be for when they are once prostrated it cannot be continued; otherwise if it had not been said 20 perches. Treby Ch. J. thought it was well enough; for if it were a total prostration it could not be continued, and then damages were given for the rest of the trespass; but if but a partial prostration, then it lies in continuance, and well enough. But Powel J. said, it must be intended, that 20 perches were actually prostrated, which cannot be continued; and if it be repugnant, the verdict cannot help it; therefore in old books they did always arrest the judgment where laid so: if the verdict helps it, it helps it at common law as much as now. Treby said, it is a *bis petitum*, and it would be ill upon demurrer; but he thought the Oxford act helped it. Powel said, that indeed the Oxford act has been largely construed Et adjournatur. Comb. 426. Trin. 9 W. 3. in B. R. Anon.

6 Mod. 39, 40. Mich. 2 Annæ, B. R. it was said, per tot. Cur. to have been adjudged, that trespass for prostrating a bench [which seems misprinted for fence] with a continuando, had been held good [which seems to mean this very case]. — See pl. 9. the last note.

9 Mod. 38,
Mich. 2
Annæ, B. R.
S. C. by
name of
MONKTON
v. ASHLEY.
adjudged for
the plaintiff.
— 2 Ld.
Raym Rep.
974. S. C.
argued; and
Holt and
Powel held
as here, but
it is not ex-
pressly men-
tioned there,

12. Trespass for *entering his close, and hunting* such a day *continuando transgressionem quoad the hunting diversis diebus & vicibus from the day of the trespass alleged till such a day*; Holt Ch. J. held that of *acts which terminate in themselves*, and being once done, cannot be done again, *as killing a hare or five hares, or cutting and carrying away 20 trees*, it ought to be alleged that *diversis diebus & vicibus* between such a day and such a day he killed 5 hares, &c. and where a trespass is laid with a continuance that cannot be continued, exception should be made at the trial, because the plaintiff ought to recover but for one trespass. And the Court held that hunting might be continued, as well as spoiling and consuming or cutting his grass. And judgment for the plaintiff, 2 Salk. 638. pl. 7. Hill. 1 Annæ, B. R. Monkton v. Pashley.

that judgment was given.

[445] (I. 2) Trespass with a Continuando. Pleadings.

1. **TRESPASS** of a close broken, and goods carried away *contra pacem Richard late king of England, & contra pacem nostram*, and *counted of parcel of the trespass in the time of king Richard, and parcel in the time of H. 4.* so that the writ supposed in a manner joint trespasses in the time of both kings, and the count *supposed several trespasses*; and yet because trespass may be continued, & *reddendo singula singulis*, the writ is good, and therefore was awarded good. Br. Trespass, pl. 91, cites 11 H. 4. 15.

2. In trespass, the plaintiff counts that the trespass was *committed such a day, &c. diversis diebus & vicibus*, without shewing the days of the continuance of it, yet this count is good. The *continuance* of the trespass is to be proved in evidence for the increase of damages. Jenk. 124. in case 52.

3. Trespass, &c. for *taking 10 loads of wheat, 10 loads of barley, and 10 loads of oats* 1st April, continuando the said trespass from 1st April to the 1st June. After a judgment for the plaintiff, it was assigned for error, that the trespass being *laid 1st April, and so all one day*, the continuando must be ill; for what was done 1st April cannot be done at another day. But judgment was affirmed; for

Sld. 319. pl.
9. Hill. 18
& 19 Car. 2.
B. R. S. C.
and observes
that a man
cannot carry
away a vast

for though for the doing a single act, as killing a horse, &c. a continuando is ill, yet where *divers things may be done at several times*, as in the principal case, though the trespass be first laid to be done the first day, the *continuando* shall make a distribution of them, (*viz.*) that part was done on one day and part on another, within the time declared. Lev. 210. Pasch. 19 Car. 2. B. R. Butler v. Hedges.

number of loads in one day, and therefore it may be with a continuando.

4. In trespass by *men and beasts* (with a continuando) and found for the plaintiff, and damages pro transgressionem prædicta. It was moved in arrest of judgment, that this cannot be; for trespass by men cannot be with a continuando. And Twisden J. doubted, but the other justices thought that judgments should be for the plaintiff, and that the damages shall be intended for this part of the trespass, which may be with a continuando. Sid. 379. pl. 8. Mich. 20 Car. 2. B. R. Pave v. Brown.

2 Keb. 407. pl. 24. PAINE v. BROWN, seems to be S. C. that the trespass was laid the 1st of October, continuando the said trespass,

a prædicto primo Septembris to a year after. It was moved in arrest of judgment after a general verdict, but this being but a mistake in the aggravation of damages, and the main trespass tried, the Court conceived it was well enough, and that the continuando is void, and the damages shall be intended for the principal entry, the other being repugnant and impossible. Judgment for the plaintiff.

5. In trespass for *fishing in his several fishery, and taking 20 bushels of oysters, &c.* continuando piscationem præd. from such a day to the time of the action brought, the plaintiff had a verdict. It was moved in arrest of judgment, that the fishing in the continuando was altogether incertain, *not expressing the quantity* or quality of the fish. And of this opinion were Wylde and Jones J. upon the authority of PLAYTER's case. But Hale Ch. J. seemed to think it well enough, and said that that case had not been well approved of late years, as to the necessity of expressing the kinds of fish, which has been since held needless. And the other justices thought the same reasonable, but thought themselves tied up by the authorities, and that Playter's case had remained unshaken. But adjournatur. Vent. 329. Trin. 30 Car. 2. B. R. Hovel v. Reynolds.

2 Jo. 109. HEVEL v. REYNOLDS, S. C. says that judgment was given by Twisden, Wild, and Jones, (dissentiente Scroggs,) that the plaintiff nil capiat per billam. — 2 Show. 196. pl. 199.

Howell v. Reynolds, says, that upon motion in arrest of judgment, it was held well enough, and that there might be a continuance thereof. — 2 Ld. Raym. Rep. 976. in the case of MONKTON v. PASHLEY, Holt Ch. J. said that trespass was brought for taking oysters continuando, which cannot be, and judgment was arrested, and that it had been so adjudged.

* [446]

6. Trespass for *breaking his close, and spoiling his grass, and trampling and eating other grass* (of the plaintiff's) *with horses, &c. and also with his waggons, &c. subverting and spoiling other grass, and the soil of the said close, and therein did dig and carry 2000 load of tobacco pipe clay, to the value of, &c. continuing the said trespass diversis diebus & vicibus.* And as to the trampling and eating the grass with their cattle, and as to the subverting and spoiling of other grass with waggons, &c. and as to the digging in the said close from such a day to such a day, the defendants demurred, because the several continuances of those trespasses were several trespasses by themselves, and ought not to be declared upon with a continuando; but Curia contra. And it seems that these words, *diversis diebus & vicibus* made the action good. But adjournatur. Raym. 396. Trin. 32 Car. 2. B. R. Nappier & al' v. Curtis.

7. Tres-

2 Jo. 194. Pasch. 34 Car. 2. B. R. S. C. by the name of LEIGHTON v. GILLOW, says, that after verdict the continuando shall be applied to the spoiling the grass only to which it is applicable, and not to

7. Trespass for *breaking his close, spoiling his grass, and taking up and carrying away 200 posts fixed in the ground*, continuando transgression. præd. to such a day; there was a verdict for the plaintiff; and intire damages and judgment for the plaintiff. Error was brought, and said that there could be no continuando as to the posts; but Curia contra; for when the continuando is de transgression' præd' generally, and the trespasses consist of divers parts, some whereof may be with a continuando, but others not, the continuando † refers only to such of which continuando may be, and not to the others; but had it been of the posts particularly, it had been otherwise. And judgment was affirmed by all the Court. 3 Lev. 93, 94. Mich. 34 Car. 2. Gillam v. Clayton.

the posts, which would be repugnant; and judgment nisi, &c.—Skin. 42. pl. 12. CLAYTON v. GILLAM, S. C. accordingly; but if it were on demurrer it would be otherwise.—2 Show. 196. pl. 198. S. C. accordingly.—Vent. 363. S. C. accordingly. And cites the case of LETCHFORD v. ELLIOT, which was trespass for entering, and feeding, and laying logs, &c. continuando transgressionem prædict. and yet good for the reasons aforementioned.—S. C. cited accordingly 2 Jo. 194. in the said case of Leighton v. Gillow.—Sid. 224. pl. 16. Mich. 16 Car. 2. and 249. pl. 17. Pasch. 17 Car. 2. Lichford v. Elliot, is only of laying logs continuando transgress. prædict. without any thing of entering and feeding, and that judgment was stayed, and that Keeling Ch. J. intended the continuando should be applied to the laying the logs upon the land, and not to the casting them on it. But the others e contra, because it is continuando transgress. quod ejectionem; but upon reading the record, it was because the logs (jecerunt) which as to this purpose is an insensible word, and so no ejection mentioned before, and there is surplusage, and shall be taken to be transgress. prædict. generally; and therefore, though it was twice moved, judgment was given for the plaintiff.—Raym. 396. Arg. in the case of NAPIER v. CURTIS, cites S. C. and says if the words diversis diebus & vicibus had been in, it had been good.

† 2 Salk. 639. S. P. in case of Brook v. Bishop.

8. Trespass quare clausum fregit, and *pulled down a wall 2 April, 2 W. & M. with a continuando to the 20th February 1 W. & M.* the Ch. J. and Eyres held, that the continuando is void, because it is impossible, and the damages shall be intended for the trespass only. Comb. 193. Pasch. 4 W. & M. B. R. Horner v. Bridges.

[As to the 20 bushels of wheat making 4 loads, I have been told formerly by a husbandman of that country where this action is laid, viz. Hertfordshire, that sacks of wheat, containing 5 bushels each, were in that country called by the name of loads, and so 4 sacks, containing

9. Trespass for *breaking his house, and taking viginti modios tritici (anglice, 4 loads of wheat) continuando totam transgressionem, from 27 Octob. to 27 Novemb.* Judgment was given in C. B. by nil dicit, and on error in B. R. the errors assigned were, that modius signifies a bushel, and that it is not possible to make 4 loads of 20 bushels; besides, the continuando cannot be for a month; for a man must have some time to rest. It was answered that the anglice was surplusage, and the continuando shews the taking not to be all at the same time, but was only to * shew how it was done; and that where a continuando is not well laid, and intire damages given, it shall be intended for that only which might have a continuance. And so was the opinion of the Court; for the taking the corn is laid to be on such a day, continuando transgressionem prædict. from that day to such a day, which is insensible. If it had been continuando transgressionem prædict. generally, it had been well enough; but it is totam transgressionem, which cannot be for breaking the house. The judgment was affirmed. 5 Mod. 178. Hill. 7 W. 3. Wilson v. Howard.

20 bushels, were there called 4 loads of wheat (distinguishing it from 4 load, without an (s)).

* [447]

10. Trespass for *breaking and entering his close on the 2d of April, and treading down his grass, and taking and carrying away 10 poplars, and 10 load of underwood, the said trespasses till 27 April diversis diebus & vicibus continuando*. It was resolved that the continuance as to the poplars and underwoods was impossible, and could not be; and that where there is a continuando of such and such things in particular, and they lie not in continuance, it is naught, even after a verdict. 2 Salk. 639. pl. 8. Hill. 1 Ann. B. R. Brook v. Bishop.

7 Mod. 152. S. C. And per Cur. the right way in trespass for repeated acts of trespass would be, that on such a day, et diversis aliis diebus & vicibus, be-

tween such a day and such a day, the defendant did so and so; and cites 20 H. 6. but in this case the continuando is impossible; and therefore no damages could be given for it; and the only mischief possible would be that of giving other acts of trespass in evidence by pretence of it; but that ought not to be suffered, and therefore not to be intended, — Comb 427. in an anonymous case 1697. in C. B. adds a note, that Powell J. said the true way of pleading is as above; for otherwise if it be laid on a certain day with a continuando, they can give in evidence but one day, (though they may chuse their day;) for that which is done on one day cannot be continued. And that Treby Ch. J. agreed that they must either do so, or make several counts for the several days. — 2 Ld. Raym. Rep. 823. S. C. accordingly.

(K) Trespass with Continuando. *At what Time it lies.*

Fol. 550.

[1.] If a man be disseised, he shall not have trespass with a continuando, after the disseisin, before that he has re-entered; because the franktenement is in the disseisor at all times after the disseisin. 19 H. 6. 27. b. 70, 71. b.]

F.N.B. 91. (L) in the new notes there (c), cites S.C.— Fitzh. tit.

Trespass, pl. 37. says nota by all the justices, that a man shall have trespass of a trespass done by the disseisor without entry; but of trespass done after the disseisin, he shall not have trespass unless he re-enters; for the issues of the land ought to be his who has the franktenement, and that he shall punish the trespass, &c.

[2 But after his re-entry he shall have trespass with continuando, from the disseisin till his re-entry. 9 H. 6. 27. b. Admitted.]

[3. But if the estate of a man be determined by limitation, or act of God, after the disseisin or ouster, so that the disseisee cannot re-enter; there, for necessity, he shall have trespass with continuando for all the time after the disseisin, without any re-entry 19 H. 6. 28. a. b.]

[4. As if tenant pur autre vie be disseised, and after cesty que vie dies, he may after have trespass with continuando for all the time after the disseisin, without re-entry, because his entry is taken away by the act of God. 19 H. 6. 28. b.]

[5. So if lessee for years be ousted, [and] after the term expires, he may have trespass with continuando for all after the ouster without re-entry, because he cannot re-enter. 19 H. 6. 28. b.]

[448] S. P. And if one does me a trespass,

and I alien the land, yet I shall have action. Fitzh. tit. Trespass, pl. 37. cites 19 H. 6. 27. Per Alcoug, and Yelverton, and Fulthorp agreed.

[6. But if the entry of the disseisee be taken away by his own act, there he shall not have trespass with continuando for the trespass by the disseisin, because it was his own folly to toll his entry.]

If one be disseised, and then the disseisor is disseised, and the first dis-

[7. As

seifce re-
leases to the
first disseisor,
yet the first
disseisor may
punish the
first disseisor,

[7. *Ar* if a man be disseised, and afterwards *releases to the disseisor*, he shall not have trespass with continuando after the disseisin till the release, because it was his folly to toll his entry by this release; and this release shall not enure as an entry and feoffment in this case. *Contra* 9 H. 6. 28. b.]

by writ of trespass for all the trespasss, because this release countervails an entry, &c. *Fitzh. tit. Trespass, pl. 37.* cites 19 H. 6. 27. per Ascough and Yelverton, to which Fulthorp agreed, but Newton denied it; but Ascough held the law as above.

* This seems misprinted, and that it should be (19).

8. P. brought trespass against W. and R. for *breaking his close, and eating his grass*, 15 *Eliz.* continuando the said trespass diversis diebus & vicibus, untill the writ purchased, which was 28 *Eliz.* Upon evidence it appeared, that W. and R. had entered, and occupied for half a year; and afterwards P. entered upon them, and occupied for a time; and after R. entered, and after that P. entered, and after R. re-entered, and occupied it till the day of the writ purchased. The question was, if this entry by P. be not such an interruption of the trespasss, that he shall be forced for every trespasss to have several actions, or that one action with a continuando will serve for all. And the Court held clearly, that one action of trespasss with a continuando will serve for all; and it may well be brought with a continuando. *Cro. E. 182. pl. 2 Pasch. 32 Eliz. B. R.* Sir Francis Willoughby, and Ralph Sacheverel, v. Patrick Sacheverel, &c.

(L) Trespass. Trespass in Forest, Park, Warren, &c.

[1. **T**RESPASS lies at common law for breaking his park, and cutting his trees. 46 E. 3. 12. b.]

[2. But trespass for breaking his park, and taking his savages, did not lie at common law. 46 E. 3. 12. b. Admitted.]

† See Park,
(A) and the
notes there.

[3. But in such case writ is given by the statute. 46 E. 3. 12. b. It seems it is the statute. † *Westm. 1. cap. 20.*]

[4. If A. has a free warren in the soil of B. A. shall not have action of trespass vi & armis against B. quare in libera warrenna sua latibula ejusdem warrennae prostravit & obstruxit per quod cuniculi de eadem warrenna interierunt; but A. is put to his action upon the case against the owner of the soil for his tort. *Mich. 9 Car. B.* between Sir WILLIAM MONSON Knight, Viscount Monson of Castleman in Ireland, and others plaintiffs, and JOHN STAPLES and others defendants, adjudged per Curiam. *Intratur. Mich. 8 Car. Rot. 1727. MOYLE.*]

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5. Trespass *quare quendam domum suam interfecit*. It was objected, that the writ ought to be *quare quendam domum suam domesticam interfecit*; for of savage beasts he shall not have recovery, unless he supposes that he took them in his close or park, or warren or chase. And afterwards the writ was abated, &c. *Fitzh. tit. Brief, pl. 564.* cites *Trin. 43 E. 3. 4.*

6. Trespass *quare warrennam intravit apud W. & cuniculos cepit & asportavit*. It was objected, that the writ should be et

in eodem cuniculos cepit & asportavit; as in trespass of goods carried away, he shall say et ibidem bona sua cepit; but the writ was awarded good. Fitzh. tit. Brief, pl. 563. cites Pasch. 43 E. 3. 13.

7. Trespass against 2 for hunting in his park, and killing 2 deer; both pleaded not guilty; and the one was found guilty, and the other acquitted. And the plaintiff prayed damages according to the statute; and the best opinion was, that he shall not have it, because he did not bring his action upon the statute. Br. Action sur le Statute, pl. 6. cites 9 H. 6. 2.

8. In trespass for entering into a park, warren, &c. it is no plea to say it is no park or warren; but he must plead non cul', and give the matter in evidence. F.N.B. 86. (L) in the new notes there (f) cites 10 H. 6. 16. 19 H. 8. 9. And says, that therefore it is held clearly, that if one has a warren, if he inclose or impark without the king's licence, and another hunts there, and he brings trespass de parco fracto, the other may plead non cul', and give this matter in evidence; for none may have a park without the king's grant, or by prescription. Note also, the plaintiff in this writ does not make any title to the park in his count; and therefore it is no plea, that he had no park by prescription or by licence; for how can judgment be given on a title where none is alleged, and cites 18 H. 6. 21.

(L. 2) Trespass for taking of the Wife. [And Pleadings.]

Fol. 551.

[1.]N trespass de uxore abducta cum bonis viri, never accoupled in lawful matrimony, is no plea; because it is not lawful to take her, if it be a marriage in facto. 9 H. 6. 34. b.]

[3. But the defendant may say, that the feme was espoused to him before she was espoused to the plaintiff, by which he retook his feme. 9 H. 6. 34. b.]

3. Westm. 2. 13 E. 1. cap. 34. Of * women carried away with the goods of their husbands, † the king shall have the suit of the goods so taken away.

At the common law the husband might have

had an action of trespass de uxore abducta cum bonis viri. 2 Inst. 434.

This is also prohibited by the statute of Westminster the 1. cap. 13. and a further punishment inflicted than was at the common law; and therefore in the original writ de uxore abducta cum bonis viri, it is concluded, contra formam statuti in hujusmodi casu proviso, meaning the said statute of Westm. 1. For this act of Westm. 2. extends only to the suit of the king; and if the writ be brought at the common law, omitting these words, contra formam statuti, then it is si A. fecerit, &c. tunc pone, &c. quod sit, &c. But if contra formam statuti be added, then the writ is si A. fecerit, &c. attachies B. ita quod eum habeas, &c. 2 Inst. 434.

The statute of W. 1. 3 E. 1. cap. 13. enables any person to sue within 40 days; but if no one commences the suit within that time, then the king shall sue; and such as are found culpable shall suffer 2 years imprisonment, and make fine at the king's will; and if they have not whereof, they shall be punished by longer imprisonment, as the trespass requires.

Note, The party shall not have the punishment enjoined by the statute, but where he is sued by a writ that makes mention of the statute. F. N. B. 89. (203.) in the new notes there (d) cites 9 H. 6. 2.

a Hawk Pl. C. 175. cap. 23. §. 72. says, that this statute of 3 E. 1. cap. 13. is repealed.

* Though

* Though the word in the statute is (mulieribus) yet that is the same as to say (uxoribus), for of ancient time mulier was taken for a wife. 2 Inst. 434.

If the wife be taken away, and *after is divorced, or if she dies*, yet the husband shall have his action *de uxore abducta cum bonis viri*; for in this action he shall not recover his wife, but damages; and he cannot have an action for taking her away as his servant, because the law gives him an action in another form. 2 Inst. 434.

Where a man marries a wife before she is of the age of 12 years, and after she comes to 12 years, and before she assents or disassents to it, a man takes and carries her away, the baron shall not have trespass *de muliere abducta cum bonis viri*; for it is not properly a marriage till she assents. Brooke makes a quare of the action; for it seems that it shall be intended a marriage till she disassents. Br. Trespas, pl. 420. cites 47 E. 3.

† S. P. mentioned 2 Inst. 434. But lord Coke says, he holds the law to be contrary; for she is *uxor* till disagreement.

The plaintiff must in his count *show the goods in certain*. 2 Inst. 435.

Albeit the words of the writ be *rapuit*, yet here it is taken for a violent taking away, and not when carnal knowledge is had; so as this action may be brought against women as well as men. 2 Inst. 435.

— And it being assigned for error, because it was said (*cepit & abduxit*) where it was objected that it ought to have been (*rapuit*) and that so is the register of writs brought in such cases. The objection was disallowed, because it may be both ways. And judgment was affirmed. Cro. J. 538, 539. pl. 6. Trin. 17 Jac. B. R. Hyde v. Scyffor.

† And albeit the words be, that the king shall have the suit, yet may the husband also have his action, as is aforesaid. 2 Inst. 434.

4. Trespas de muliere abducta & rapta cum bonis viri *asportatis*, against baron and feme, and others; and well against the feme; for one feme may assent and aid to the ravishment of another feme, and may carry away the goods; and there it is agreed, that *it is no plea that the plaintiff and the feme are divorced*; for he is not to recover his feme, but damages; and if she was feme tempore, &c. this suffices. Br. Trespas, pl. 43. cites 43 E. 3. 23.

5. Trespas of taking his feme. Little said, *actio non*; for a debate was between the plaintiff and his feme, by which the plaintiff gave licence to the defendant to take his feme to his house, which he did accordingly, to intreat the feme to be amiable and well-disposed to her baron. Judgment, &c. Laicon said, this is no plea; for it is not lawful to take the feme against her will. But per Markham Ch. J. it is lawful against the baron, plaintiff, who gave the licence. And so to carry his feme from one place to another, by which the other traversed the licence. Br. Trespas, pl. 294. cites 1 E. 4. 1.

6. Trespas of taking his feme and goods, and said that the feme prayed him to put her upon the horse, and to carry her to Westminster, to sue a divorce between her baron and her, and he did so. Per Conisby, this is a good plea. And per Fineux, to sue a divorce is good cause for discharge of conscience. And adjournatur. Br. Trespas, pl. 440. cites 20 H. 7. 2.

(L. 3) In what Cases it lies for intermeddling with the Feme.

1. A Man may aid a feme who falls upon the ground by a horse; and so if she be sick; and the same if her baron would murder her, per Conisby. And the same, per Rede, where the feme would kill herself. And per Fineux, a man may conduct a feme in a pilgrimage. Br. Trespas, pl. 440. cites 20 H. 7. 2.

2. Trespals for carrying of his feme, without the assent of the baron, to L. to sue a divorce. Per Fineux, the action does not lie, for it was lawful for the defendant to carry her; for it shall be intended that there was cause of divorce. Br. Trespals, pl. 207. cites * 12 H. 1. 37.

* This is misprinted, and should be 21 H. 7. 13. a. pl. 17.

3. And where the feme is going to market, it is lawful for another to suffer her to ride behind him upon his horse to market; per Fineux. Br. Trespals, pl. 207. cites † 12 H. 1. 37.

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† See the note to pl. 2.

4. And if a feme says, that she is in jeopardy of her life by her baron, and prays him to carry her to a justice of peace, to obtain a warrant of the peace, he may lawfully do it; and a man may lawfully sue to have judgment in the law; per Fineux. Br. Trespals, pl. 207. cites ‡ 12 H. 1. 37.

‡ See the note to pl. 2.

5. And a man may lawfully pursue to reverse a judgment; per Fineux. Br. Trespals, pl. 207. cites § 12 H. 1. 37.

a man to aid her to reverse the outlawry, it is lawful for him to aid her; per Fineux. pl. 207. cites § 12 H. 1. 37.

So if a feme be outlawed, and desires Br. Trespals,

§ See the note to pl. 2.

6. Where my feme is out of her way, it is not lawful for a man to take her to his house, if she was not in danger of being lost in the night, or of being drowned with water; per Brudnell. Br. Trespals, pl. 213. cites 21 H. 7. 27.

(L. 4) *Quare Filium & Hæredem rapuit, &c. or other Injuries done to a Child.*

See Father and Son (A).
See Guardian (X).

1. TRESPASS de filio & hærede querentis abducto, & capto vi & armis. Skrene prayed judgment of the writ; for it is not said *cujus maritagium ad ipsum pertinet*. Per Hank. it is intended by the law, that the marriage belonged to him; and adjournatur. But it seems, that he shall say as Skrene said, for otherwise it may be that the father had married him before the taking. Nota. Br. Trespals, pl. 101. cites || 12 H. 4. 16.

S. P. per Seton. Ibid. pl. 252. cites 29 Aff. 35. || Br. Garde, pl. 77. cites S. C. where it said, that Hank. utterly denied

that the writ shall be *cujus maritagium ad ipsum pertinet*. And adjournatur.

2. Trespals against W. T. quare R. filium suum & hered' apud T. inventum rapuit & abduxit. Yelverton *protestando* that he such a day delivered the infant to his father, *pro placito dicit*, that it was † noised in the country that the plaintiff was dead, and his feme was dead in fact; by which the defendant, as uncle and prochein amy of the said R. came to T. to see the said R. and found the said R. of the age of one year, ill governed, and out of his ward, by negligence of his nurse, by which he took him, as lawfully he might. Per Paston, if a man sees an infant in the street in peril of death, and takes him and delivers him to his father, this is no tort. But per Newton, if a man ravishes my son, and after redelivers him, it does not excuse the rape; but the cases are not alike. And per Porington, it is not lawful for any to take an infant out of the custody of a nurse to whom he was put by the father. But Newton

† The other editions are (il fuit nurse), but seem by the sense to be misprinted.

said, that if an infant is put to nurse, and I see him in peril of a dog, or of a horse, and I take and deliver him to the father, this is no tort, by which the issue is good above, and therefore it stood; quod nota. Br. Trespafs, pl. 141. cites 21 H. 6. 14.

2 Wms.'s
Rep. 116.
S. C. cited
per lords
commission-
ers, in case
of Eyre v.
Lady Shaftes-
bury.

3. Every ancestor, male and female, shall have trespafs, or writ of ravishment of ward, against every stranger who, of his own tort, ravishes the heir apparent of any person, be the heir male or female; and the writ shall say, *cujus maritagium ad ipsum pertinet; and it matters not of what age the heir apparent is in such case.* 3 Rep. 38. b. Hill. 34 Eliz. B. R. Ratcliff's case.—— Cites 32 E. 3.

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4. But such action did not lie against guardian in chivalry, but only for the father; who might have action against such lord, where his son and heir apparent was ravished by him. Ibid. cites Litt. f. 114. and 18 E. 3. 25. 30 E. 3. 17. 29 E. 3. 7 & 19.

5. In trespafs for thrusting one on his son, an infant under the age of discretion, and breaking his thigh-bone, whereby the plaintiff was at great labour and charges in the cure, &c. Upon not guilty pleaded, the plaintiff had a verdict, and damages 5l. It was moved in arrest of judgment, because the plaintiff sustained no wrong, and he was not compelled to expend any money, or procure his son's cure. Raymond J. thought the action did not lie for the father, it not being laid *per quod servitium amisit*, nor that the child was less capable of procuring a fortune with a wife; but that the child should have brought the action. But Mountague Ch. B. and Atkins clearly for the plaintiff, and judgment was given for him. Raym. 259. Pasch. 31 Car. 2. in the Exchequer. Hunt v. Wotton.

(L. 5) Threatening the Plaintiff's Tenants, so as they depart. And Pleading.

But the action does not lie but of the tenants at will, and not of the tenants for

years, by all the justices. The reason seems to be inasmuch as the one may depart at his will, and the other not; so against the one lies debt or distress, and e contra against the other. Br. Trespafs, pl. 144. cites 21 H. 6. 31.

1. **I**N trespafs *quare tales & tantas minas tenentibus suis imposuit ita quod de tenuris suis recesserunt*, the plaintiff ought to declare their tenures, and how much land they held, and of what value, by reason of the recovery of damages; per Cur. Br. Trespafs, pl. 144. cites 21 H. 6. 31.

2. In trespafs of menacing his tenants, *per quod recesserunt a tenementis suis*, it suffices to justify the menacing, without answering if they recesserunt a tenementis suis, &c. Br. Faux Imprisonment, pl. 3. cites 35 H. 6. 54.

3. Action upon the case *quare servientes, or tenentes suos verberavit, per quod a servitio, or tenuris suis recesserunt*, is a good writ, without shewing the names of the servants or tenants, where it is *plurally*. Contra if it were *servientem* or *tenentem* singularly; per Choke. Br. Brief, pl. 375. cites 14 E. 4. 7.

4. Trespass of menace of his tenants at will of life and member, *ita quod recefferunt de tenuris suis* of the plaintiff, to the damage of the plaintiff 101. Yaxley said, the defendant was seised till by the plaintiff disseised, who leased at will; and the defendant re-entered, and said to the tenants, that if they would not depart, that he would sue them as the law wills, which is the same menace, &c. and to the menace of life and member, not guilty. And this menace to sue them, if they would not depart, is a good plea; per tot. Cur. For he does not menace them to sue them for their possession, which they had before his regress; and therefore this is in nature of menace; and to the life and member he pleads not guilty, and so the plea is good in toto. Br. Trespass, pl. 285. cites 9 H. 7. 7.

(L. 6) *Beating Servants. And taking them out of [453]*
their Service. *And Pleadings.*

1. TRESPASS of taking his servant vi & armis; it was objected that he had not counted how the servant was out of his service; and yet well; it seems that this shall come in evidence. Br. Trespass, pl. 196. cites 39 E. 3. 38.

2. In trespass of retaining his servant who departed, &c. the being in the service of the plaintiff is not traversable, but the retainer in service. Br. Traverse per, &c. pl. 319. cites 41 E. 3. 20.

3. Trespass of his servant and certain sheep taken vi & armis; the defendant said that he found him vagrant and retained him. The plaintiff said, that he retained him first by a year, within which term the defendant procured him to depart, which he did, and the defendant retained him; and the opinion of the Court was that the replication is contrary to the writ. And this is not trespass vi armis; by which the plaintiff said, that he procured him pritt. Trem. said, you ought to traverse the vagrancy, & non allocatur, by which the defendant maintained his bar, absque hoc that he took him, and so to issue. And per Thirn. and Culpepper the writ lies well. Contra Hank. and Hill. Br. Trespass, pl. 92. cites 11 H. 4. 23.

4. Trespass of taking a servant retained; the defendant said that before he was retained with the plaintiff he was retained with him, by which he found him vagrant, and took him; and the plaintiff said that he was not first retained with the defendant. And per Martin this is not good pleading; for the plaintiff shall say in his replication, that such a day he was retained with him, before which day he was not retained with the defendant. And Rolf. did so. Quære of this manner of pleading. Br. Issues joins, pl. 2. cites 3 H. 6. 31.

Br. Journe,
pl. 4. cites
S. C.

5. Trespass of battery of his servant, & quod servitium servientis sui prædicti per magnum tempus amisit. Yelverton prayed judgment of the writ; for it ought to be per quod servitium, &c. and not & quod servitium, &c. Et non allocatur, for it is all one. Br. Trespass, pl. 21. cites 20 H. 6. 14.

6. Where a man beats him who serves me at pleasure, or an infant whose covenant is void, yet I shall have an action upon the case

F.N.B. 91.
(H) in the
new notes

there (a) case for the battery for the loss of my service. And the same
 cites 11 H. law where I retain a man who is beat, &c. And here it lies for
 4. 2. per the master *vi & armis*. Br. Action sur le Case, pl. 35. cites
 Hull accord- ingly. — † 21 H. 6. 8 and 9. and the Register 102 and 182.
 † Br. La-

bourers, pl. 29. cites S. C. — in trespass of beating his servant, the *plaintiff need not to count of*
retainer; for if a man serve me at his pleasure, and he is beaten, by which I lose his service, trespass
 lies by me; quod nota. Br. Trespass, pl. 157. cites 22 H. 6. 43.

In trespass for beating his servant, it was held not necessary, that he be a hired servant as the statute
 of 5 Eliz. declares, &c. to have this action; but if *hired for any time certain*, it suffices; and note
 the *servant* in this case was *only to help to load corn*, and was not entertained in the plaintiff's house,
 but *went to his own house every night*. And holden the action not maintainable for beating such a
 servant. Clayt. 133, 134. pl. 241. Summer assises 1649, before Thorpe J. Linley v. Watter.

And Serjeant Widdrington said, a man may be said a hired servant within the statute 5 Eliz. though
 the hiring be for *less time than a year*. Ibid.

In trespass of a servant taken, it is a good plea that he was not his servant at the time. Br. 7. In trespass of battery of his servant, per quod servitium
 suum amisit, &c. It is no *plea that non amisit servitium servientis*
predicti, for by this the battery is confessed, and then the law im-
 plies that the master * is damnified. But is a good † *plea that he*
was not his servant at the time. Br. Traverse per, &c. pl. 378.
 cites 31 H. 6. 12.

Trespass, pl. 326. cites 12 E. 4. 7. — S. P. Ibid. pl. 303. cites 5 H. 7. 3. per Cur.

† S. P. Trespass, pl. 34. cites 34 H. 6. 28. 43.

* [454]

§ In trespass for breaking his close, and beating his servant; up- 8. The master shall not have trespass of battery of his servant,
 on not guilty pleaded, the if he does not say § *per quod servitium servientis sui amisit, &c. con-*
 plaintiff had a verdict, and the jury assessed intire damages; and because the plaintiff had no cause of
 action for battery of his servant, he *not having averred that he lost his service*; it was ruled that the
 plaintiff nil capiat per billam. 5 Rep. 108. in Sir H. Constable's case, cites it as adjudged, Mich.
 14 & 15 Eliz. B. R. Pooley v. Osburn. — S. C. cited 10 Rep. 130. b. in James Osborne's case.
 — S. C. cited 2 Bulst. 112. — S. C. cited by Bridgman Ch. B. Trin. 12 Car. 2. Hard. 106.
 in case of Rochel v. Stedle.

Bendl. 157. 9. W. A. brought trespass against W. S. and others, and the
 pl. 217. S. C. writ was quare clausum fregerunt & in homines & servientes suos
 accordingly, insultum fecerunt, &c. and counted that the defendants in homines
 that the writ & servientes suos, viz. in quosdam W. A. filium querentis ac Ursu-
 was abated; lam Clerk & Winifrid Coppin servientes suos insultum fecerunt, &c.
 and says, It was found for the plaintiff. And it was moved that the *decla-*
 that the ration varies from the writ; because the writ is in homines, &c.
 reporter was insultum fecerunt, and the declaration is of one man only, and
 of counsel the writ was abated. Bendl. at the end of Kelw. 211. b. pl. 30.
 with the — And. 13. Mich. 8 & 9 Eliz. Armisteed v. Steedman.
 defendant. pl. 28. S. C. accordingly;

but as to the declaration not mentioning men, the reporter says quære of this reason; for homines
 is a word which contains in it as well the female as the male, but what these words homines suos
 intend, and what shall be the sense thereof, quære.

Gilb. Hist. 10. Trespass by bill filed Hill. 18 Jac. that the defendant 20 Jan.
 of C. B. 107. 17 Jac. assaulted and wounded his servant per quod servitium amisit
 cites S. C. per magnum tempus scilicet a predicto 20 Martii 17 supradicto usque.
 and says, the Martii tunc prox' sequent' perdidit; upon nihil dicit, a writ of in-
 defendant quiry

quity found damages 10l. It was moved that the 20 March was a misprision, and should have been 20 Jan. till the 1 March. But the Court held it not good, nor aided by intendment. And here the loss of the service is the point of the action which ought to be certainly shewed; for that only enables him to the action; and if the time be not expressed therein, the count is not good, and therefore *the scilicet* and what comes after it is *material*; which being ill alleged, the count is not good. And adjudged for the defendant. Cro. J. 618. bis. pl. 8. Mich. 18 Jac. B. R. Hanbury v. Ireland.

had judgment, because the gift of the action being for the loss of the service, is not ex necessitate rei relative to the battery; and the plaintiff having

laid a different month from the battery, there is nothing in the record to determine the Court to the 20th of January, and to reject the word March as repugnant, and if the loss of the service stands on the month of March, viz 17 March following, it takes 3 months of the time elapsed, after the time of the action brought, for which the jury was not authorized to give damages.

11. Trespass quare vi & armis J. S. being the plaintiff's servant *cepit & abduxit* at D. in Essex; the defendant *pleaded that J. S. was vagrant in the same county, and that not having notice that he was another's servant, he retained him, &c.* Hobart seemed to think the plea good, and Winch seemed to agree; and by Hobart and Hutton, an action for receiving and entertaining a servant may not be said to be vi & armis. Winch, 51. Mich. 20 Jac. C. B. Anon.

12. No action of trespass lies for the taking away a man (*a negro*) generally. But there may be a special action of trespass for taking his servant, *per quod servitium amisit*. Per Cur. And judgment was given accordingly. 5 Mod. 191. Pasch. 8 W. 3. Chamberline v. Harvey.

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(M) Trespass. Who shall have the Action. [*In respect of special or general Property.*]

[1. **H**E that *has goods to agist* may maintain a trespass for taking of them. 48 E. 3. 20. b.]

Br. Brief, pl. 514. cites S. C. —

Br. Trespass, pl. 67. cites S. C. and the defendant said, that the beasts were the property of J. N. who sued a replevin and had deliverance; the plaintiff replied that J. N. agisted them to him before the taking. It was objected that the writ should be in *custodia vestra existent*; but it was answered that there is no such writ in Chancery, though the writ of execution shall be so, and that in this case neither the one or the other may have the writ; but per Persey, when the one recovers the action of the other is gone; and afterwards issue was joined whether they were agisted to the plaintiff or not.

[2. He who *has beasts for a year to feed his land*, may have general trespass against a stranger, if he takes them within the year. 11 H. 4. 24. b.]

[3. So he shall have trespass *against the lessor himself, if he takes them within the year.* Contra, 11 H. 4. 23. b.]

He that has a special property of the

goods at a certain time, shall have a general action of trespass *against him that has the general property*; and upon the evidence damages shall be mitigated. 13 Rep. 69. in case of HEYDON v. SMITH, cites 21 H. 7. 14.

[4. So *against his alienee.* Contra, 11 H. 4. 23. b.]

See pl. 1.

S.C. and the
notes there.

[5. The *agifter* of the goods may have trespafs for the taking of them. 48 E. 3. 20. b.]

[6. If the *lord* seizes the goods of his *villein*, and leaves them in his possession to his use, and after the goods are taken out of his possession, he shall not have trespafs, because they are the goods of the lord. 11 H. 4. 1. b. (It seems because he is not chargeable over.)]

13 Rep. 69.
cites 14 H.
4. 23. —

[7. The *bailee* of goods to keep, shall have trespafs against any who takes them out of his possession. 14 H. 4. 28. b.]

Clearly the bailee, or he that has a special property, shall have a general action of trespafs against a stranger, and shall recover all in damages, because he is chargeable over. 13 Rep. 69. cites 21 H. 7. 14. b.

[8. If a man takes my servant out of my service with my goods, trespafs lies of goods carried away, and servant taken. 14 H. 4. 32. b.]

9. Where a thing certain is devised, and a stranger takes it, the devisee shall have trespafs before the livery of the executors. But contra of a thing uncertain, as a 3d part of the goods, &c. Br. Trespafs, pl. 25. cites 27 H. 6. 8.

10. If 2 executors are, and the one has the goods, and a trespasser takes them, and the executor from whom they were taken dies, the other executor shall have trespafs; for the possession of the one executor is the possession of both. Br. Trespafs, pl. 346. cites 20 E. 4. 18. Per Tremail justice.

11. If I bail goods to a man who gives or sells them to a stranger, and the stranger takes them without delivery, I shall have trespafs; for by the gift or sale the property is not changed, but by the taking; but if the bailee delivers them to the stranger, I shall not have trespafs; per Fineux and Tremail Justices. Br. Trespafs, pl. 216. cites 21 H. 7. 39. but Rede contra. Ibid.

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12. And if an infant gives or sells the goods, and delivers them, trespafs does not lie. Contrary if the other takes them by the gift or sale without delivery; per Fineux and Tremail Justices. Br. Trespafs, pl. 216. cites 21 H. 7. 39.

But where a
servant is
only entrusted
with goods,
he has nei-
ther general

13. A servant who is commanded to carry goods to such a place, shall have an action of trespafs or appeal. 13 Rep. 69. in case of HEYDON v. SMITH, cites 1 H. 6. 4. 7 H. 4. 15. 19 H. 6. 34. 11 H. 6. 28.

nor special property in them, and he shall have no action of trespafs, if they are taken away; per Anderson. Goldsb. 72. pl. 18. Mich. 29 & 30 Eliz. Blossie's case.

14. A. in London gives goods to me which are in York, and before my possession B. does a trespafs to them; I shall have trespafs, because property draws possession in personal things; per Doderidge J. Lat. 263. in case of Hodson v. Hodson.

15. Master of a ship may have case or trespafs for seising and detaining the ship, and declare on his possession, and recover for his particular loss; per Holt. 1 Salk. 11. pl. 4. Pasch. 12 W. 3. B. R. Pitts v. Gaince, &c.

(N) Trespas. What Person, in respect of Estate, shall have the Action.

[1. **T**ENANT at sufferance shall maintain action of trespas against a stranger. Contra, 9 H. 6. 43. b. admitted.] He shall have the action in

respect of his possession. 13 Rep. 69. Per Cur. in case of HEYDON v. SMITH, cites 30 H. 6. Trespas, 10. — [But the sense seems not right there] and Fitzh. tit. Trespas, pl. 10. which cites S. C. says he cannot have the action, because he cannot intitle himself to the land by such sufferance; for he cannot make issue.

[2. If tenant at will be ousted by a stranger he may maintain a trespas against him. 18 H. 6. 1. Contra, 11 H. 4. 90. Dubitatur, 21 E. 3. 34.] Fitzh. tit. Trespas, pl. 10. cites Trin. 30 H. 6. that he

may. — 13 Rep. 69. Per Cur. in case of HEYDON v. SMITH, 21 H. 7. 15. and 11 H. 4. 23. that he may have such action.

Trespas in B. R. of a close broken, and grass spoiled, transgression prædict. continuand' by 8 years. The defendant plead'd his franktenement, the plaintiff said that before that the defendant any thing bad, J. was thereof seised in fee, and leased to A. for term of life, and A. leased to H. all his estate, and H. leased to the plaintiff at his will, by which he was possessed till the defendant ousted him, and disseised H. and did the trespas, upon whom the plaintiff re-entered, claiming his estate, and brought the action of trespas, and averred the life of H. The defendant maintained the bar, and traversed the disseisin, and so to issue, and found for the plaintiff; and the tenant alleged in arrest of judgment, inasmuch as the tenant at will who is ousted cannot re-enter: for by the disseisin the will of the lessor is determined, and the lessee cannot have any action to recover his interest; for he cannot have assise, nor ejectione firmæ, because his estate is not certain, and also he has not averred the life of H. his lessor, and yet the plaintiff recovered by award. And so it seems that tenant at will, who is ousted by disseisin, may have disseisin without commandment of his lessor, and that the life of H. shall be intended without averment, and if H. be dead, then the plaintiff is an occupant. But by the reporter the life of H. ought to be averred; but dubitavit after. And see that this action was not only for the first entry, but for the continuance of the trespas after the entry; for it is transgression prædict. continuand' by 8 years. Br. Trespas, pl. 227. cites 38 H. 6. 27.

So if lessee at will be ousted, and the estate of his lessor determines by his death, now the lessee shall have trespas with a continuando without regress; for when he may not enter, the law supplies it, and the mean profits and emblements belong to him; per Gawdy J. Goldsb. 145. pl. 60. Hill. 43 Eliz. cites 38 H. 6.

* Lessee at will may have trespas against wrong-doers, but not against any one that enters by colour of title. Sid. 347. pl. 13. Mich. 19 Car. 2. B. R. in case of Geary v. Barecroft.

[3. If a man subverts the land in lease at will, the lessee may have a trespas against him, and shall have damages for the profits, and the lessor may have other trespas, and shall recover damages for destruction of the land. 19 H. 6. 45.] * [457] Br. Trespas, pl. 131. cites S. C.

[4. If trees are cut upon the land of tenant at will by the custom, he may have action of trespas. 2 H. 4. 12. And Br. Trespas, pl. 73. cites S. C. — Br. Tenant per Copy,

pl. 2. cites S. C. and he shall recover his damages by judgment, though the franktenement be another's.

[5. The same law is of a lessee for years. 2 H. 4. 12.]

[6. Lessee for years shall have trespas for trespas done upon the land. 18 H. 6. 1. 21 E. 3. 34.]

[7. If a man beats my servant I shall have trespas, and the servant another trespas, diversis respectibus. 19 H. 6. 45.] Pol. 552.

Br. Trespas, pl. 131. cites S. C.

[8. If *baron leases for years the land of the feme*, and after *feme dies*, the *heir of the feme* shall not have trespass against the *lessee before entry*. (For the *lessee* is tenant at sufferance.) 9 H. 6. 43.]

Nor trespass quare clausum fregit; per Doderidge J.

[9. A *commoner* shall not have action of trespass of *grass trodden and spoiled*, because though he has common there, yet the grass is not his. 22 Aff. 48. Curia.]

2 Bulst. 88. in case of WHITTIER v. STOCKMAN, cites 12 H. 8. 2. in Simon de Hartcourt's case. — Arg. Cro. E. 421. in case of WELDEN v. BRIDGWATER, cites 14 H. 8.

But the commoner may *disfrain and avow for damage feasant*. Br. Trespas, pl. 174. cites 15 H. 7. 13. and herewith agrees 24 E. 3. Ibid

If *beasts are taken in a common, or other land which does not belong to the owner of the beasts*, yet he shall have trespass *vi & armis*, but not *quare clausum fregit*. Br. Trespas, pl. 421. cites 3 M. 1.

10. Where the *king has profits of any land by reason of outlawry in action personal*, and damage is done in going over the grass or corn, he shall have action of trespass; for *he has an interest in the land*, and yet *he has not the land itself*. Br. Trespas, pl. 172. cites 15 H. 7. 2.

11. *Guardian in knight service*, who has *custodiam terræ*, shall have trespass of cutting down the trees of the *heir that has the inheritance*. 13 Rep. 69. Per Cur. in case of HEYDON v. SMITH, cites 2 H. 4. 12.

2 Roll. Rep. 140. S. C. and S. P.

12. Trespas *vi & armis* does not lie for *locking or breaking a seat in the chancel*, in which the plaintiff claims no interest, but only *sedere* there; but otherwise if he conveys to himself therein; by the opinion of all. Palm. 46. Mich. 17 Jac. B. R. Dawtrie v. Dec.

13. It has been much doubted whether a *bargainee before actual entry* can maintain an action of trespass. Arg. Vent. 361. Hill. 33 & 34 Car. 2. B. R. in the case of Perry v. Bowes.

14. Trespas is founded only on the possession; so that *he in reversion* shall not have trespass against a stranger for *drowning the land and rotting the trees*. 3 Lev. 209. Hill. 36 & 37 Car. 2. and 1 Jac. 2. C. B. Biddlesford v. Onslow.

15. If a person *preach in a parish church without leave of the parson*, he is a trespasser; per Holt Ch. J. 12 Mod. 420. Mich. 12 W. 3. B. R. Anon.

[458] See (G. a). Sheriff (B. a)

(O) Trespas. *Against whom it lies. In what Cases against Sheriff, or other Officer of a Court.*

Br. Office and Officer, pl. 8. cites S. C.

[1.] If a *bailiff of a court upon summons* to him directed, *attaches the party by the goods of another man*, trespass lies against him; for he ought to take *conusance* of the goods of the party. 11 H. 4. 91.]

Br. Trespas, pl. 99. S. P. cites 11 H. 4. 90.

[2. So if he attaches the *servant by the goods of his master*. 11 H. 4. 90. b. 91. b. adjudged, *being in possession of the servant*. 13 H. 4. 2. b. adjudged same case.]

Br. Office and Officer, pl. 8. cites S. C.

[3. The same law if a *sheriff upon an execution takes the goods of a stranger*. 11 H. 4. 90. b.]

[4. But

[4. But if he attaches the defendant by the goods of another man being in his possession, it is justifiable. 11 H. 4. 90. b. for he is chargeable over.]

[5. If the sheriff takes one man for another, false imprisonment lies against him. 11 H. 4. 91.]

[6. If the sheriff upon a replevin sued by J. D. delivers the beasts of a stranger, upon shewing of J. D. the owner of the beasts may have action of trespass against him. 14 H. 4. 25.]

whether the beasts are the same, on pain of rendering damages. Br. Notice, pl. 23. cites 14 H. 4. 24.

[7. If the sheriff comes to make replevin of beasts impounded in another man's soil, if the place be inclosed, and has a gate open in the same inclosure, he cannot break the inclosure and enter thereby, where he may enter by the open gate. 20 H. 6. 28.]

[8. But if the owner hinders him, so that he cannot go by the open gate for fear of death, he may break the inclosure, and enter there. 20 H. 6. 28.]

[9. If the sheriff makes a warrant to the bailly of a franchise, to take the goods of a man in execution, and he mistakes the goods, and takes the goods of another man, the bailies are trespassers, and not the sheriff. M. 7 Ja. Per Coke.]

[10. If a man be arrested by the bailies of the sheriff, and thereupon he shews to them a supersedeas to discharge him, and the bailies refuse it, and detain him after in prison, he shall have false imprisonment against the bailies, and not against the sheriff. Trin. 17 Ja. B. per Curiam.]

was delivered to the sheriff, unknown to the bailiff, who takes the party, lets him escape, and after 20 days retakes him. False imprisonment lies; for having time by intendment to have notice from his master, he ought at his peril to take notice of the supersedeas. Cro. E. 918. pl. 10. Hill. 45 Eliz. B. R. Prince v. Allington.——Mo. 677. pl. 921. says, that the bailiffs had notice.

Br. Office & Officer, pl. 8. cites S. C.

Br. Office & Officer, pl. 10. cites S. C.

—He must take notice

Fitzh. tit. Replication, pl. 11. cites S. C.

Sheriff made a warrant to his bailiffs on a ca. sa. Afterwards a supersedeas

11, If execution be executed upon goods by force of a judgment, and after the judgment is vacated, yet neither the sheriff or his assistants shall be punished by trespass; though the contrary was adjudged in the case of TURNER v. FELGATE, 2 Sid. 125. But this judgment was afterwards disallowed. See 1 Sid. 272. in case of BAILY v. BUNNING, and Lev. 95. where the case of Turner v. Felgate is cited by Twisden and Windham J. who said they remembered it to be adjudged.

(P) Trespass and false Imprisonment. Against whom [459] as aiding, or Assistant to Officers.

[1.] If a man sues a plaintiff in a court, and upon the attachment the bailiff takes the goods of a stranger, without the shewing or procurement of the plaintiff, trespass does not lie against him; for he is no party to the tort. 11 H. 4. 91. 13 H. 4. 2.]

doing. Br. Office and Officers, pl. 8. cites S. C.——Br. Trespass, pl. 99. cites S. C.

* Fol. 553.

But the bailiff is a trespasser by so accordingly.

[2. The

Br. Office & Officer, pl. 8. cites 11 H. 4. 90. [2. The *same* law it is, where *one man is taken for another* by the sheriff ut supra. 11 H. 4. 91. b. False imprisonment does not lie. 13 H. 4. 2. b.]
S. P.—

Br. Trespafs, pl. 99. cites S. C. accordingly.—C. brought false imprisonment against L. who justified because he had a warrant to arrest J. D. and he demanded of C. what his name was, and he answered that his name was J. D. by which he arrested him. And the plaintiff demurred, and it was adjudged for the plaintiff, because the defendant ought at his peril to have taken notice of the party. Mo. 457. pl. 629. Trin. 38 Eliz. Rot. 495. Coote v. Lighworth.

So where commission of rebellion issued against Thurbane, but one Green appeared before the commissioners, and affirmed himself to be the person; whereupon they apprehended him by virtue of their commission, and in resisting he snatched the commission from them, and tore it in pieces. Upon an affidavit of this matter, an attachment was prayed against Green. Hale Ch. Baron said, if a wrong man be taken, though he affirm himself to be the person against whom the commission was awarded, yet that will not excuse the commissioners from false imprisonment, because they had no warrant to take him. But an attachment was granted, nisi, &c. Hard. 323. pl. 2. Pasch. 15 Car. 2. in the Exchequer, Thurbane's case.

Br. Office & Officer, pl. 8. cites 11 H. 4. 90. [3. But otherwise it is if he *procures the bailiff to take those goods, or shews* them to him. 11 H. 4. 9.]
4. 90. and says, that in such case both are trespassors. [And the (9) here seems misprinted for (90).]—
Br. Trespafs, pl. 99. cites S. C. accordingly.

Br. Trespafs, pl. 99. cites 11 H. 4. 90. [4. So it is if he *procures the sheriff to take one man for another, or shews* him to him. 11 H. 4. 91. 13 H. 4. 2. b.]
that they are both trespassors.—Br. Office & Officer, pl. 8. cites S. C. accordingly.

See (O), pl. 6. S. C. [5. So in a *replevin*, if the plaintiff *shews the beasts of a stranger for his own* beasts, and the sheriff takes them, trespass lies against the plaintiff. 14 H. 4. 25.]
Br. Trespafs, pl. 104. cites S. C.—Ibid.
pl. 99. cites 11 H. 4. 90. that both are trespassors.—Br. Office & Officer, pl. 8. cites S. C. accordingly.

Br. Trespafs, pl. 11. cites S. C. [6. The plaintiff in a *replevin* may justify the entry into the close of the defendant, to shew the beasts to the sheriff to make deliverance. 3 H. 6. 37. b.]

7. Trespafs against baron and feme of taking of a horse, it was said for the baron that he brought plaint in the court of C. against the plaintiff, and the bailiff attached the horse, and he came in aid of the bailiff; and for the feme it was said that she came in aid of the bailiff; and held a good plea for the feme as well as for the baron, by which the plaintiff said that they took de son tort demesne, absque tali causa; and the others e contra. Br. De son tort, &c. pl. 4. cites 41 E. 3. 29.

If the sheriff arrests a man, another may justify to come in aid of him without precept. 8. Trespafs; the defendant justified the imprisonment by virtue of a precept to arrest the plaintiff, which he did, and the other defendant came in aid of him; quod nota, the coming in aid of an officer * is a good plea by a stranger to the precept. Br. Trespafs, pl. 133. cites 19 H. 6. 43. 56.
Br. Faux Imprisonment, pl. 23. cites 8 E. 4. 14.

* [460]

(Q) Trespafs. *Who shall be said the Trespaffor.*

[1. IF my servant without my notice puts my beasts in another's land, my servant is the trespaffor, and not I, because by the voluntary putting of the beasts there without my assent, he gains a special property for the time; and so to this purpose they are his beasts. 12 H. 7. Kell. 3. b.]

But where a servant puts beasts into his master's own land, and they escape into

the land of another next adjoining for want of fences, which the other ought to make, the master only is to be charged as trespaffor, and not the servant. But where the servant put in his master's beasts into another's land, and justifies for common of his master, which is a confession of his putting them into another's soil, there the servant is the trespaffor. Br. Trespafs, pl. 155. cites 22 H. 6. 36.

[2. But it seems, if my wife puts my beasts into another's land, I myself am trespaffor, because the feme cannot gain a property from me. Contra, 12 H. 7. KELLOWAY, 3. b.]

3. If several come, and the one does the trespass, and the others do nothing but come in aid, yet all are principal trespaffors, and shall render damages, and shall be imprisoned; nota. Br. Trespafs, pl. 232. cites 22 Aff. 43.

4. If a man enters into land as disseisor or trespaffor to my use, and I agree to it, as by taking of profits after, or by granting of it over, &c. I am by this principal trespaffor, and action lies against me leaving out the other, and there the plaintiff shall recover; quod nota. Br. Trespafs, pl. 256. cites 38 Aff. 9.

Br. Ejectione, &c. pl. 8. cites S. C.

5. He who commands a trespass to be done, or agrees to a trespass, entry, &c. done to his use by any without his command, is principal trespaffor; for in trespass there is not any accessory. Br. Trespafs, pl. 113. cites 38 E. 3. 18.

S. P. As in ejection of ward against the bishop of W. who said

that he did not eject; and it was found by nisi prius, that J. who was bailiff of the bishop, seized to the use of the bishop, and the bishop manured the land, and took the profits, and aliened the ward over, and so agreed, but knew not whether J. ejected by commandment of the bishop; and the bishop was condemned, and the plaintiff recovered. Br. Ejectione, &c. pl. 5. cites S. C.

S. P. So where a servant takes a sheep for an amercement, and the master agrees, he is equally liable to an action of trespass as the servant. Clayt. 5. Farrer v. Eastwood.

6. Hue and cry is a good cause to take a man upon suspicion of felony, and if it be made without cause he who made it shall be punished, and not the other who arrested the man. Br. Trespafs, pl. 213. cites 21 H. 7. 27.

7. A. brought an action of trespass against B. pedibus ambulando; the defendant pleads this special plea in justification, viz. that he was carried upon the land of the plaintiff by force and violence of others, and was not there voluntarily, which is the same trespass for which the plaintiff brings his action. The plaintiff demurs to this plea; in this case Roll J. said, that is the trespass of the party that carried the defendant upon the land, and not the trespass of the defendant; as he that drives my cattle into another man's land is the trespaffor against him, and not I who am owner of the cattle. Styl. 65. Mich. 23 Car. Smith v. Stone.

(R) Trespass. *Against whom it lies.*

Fitzh. tit.
Action sur
le Statute,
pl. 12. cites
S. C. —

[1. **BARON** may have trespass against a *feme and others for ravishment of his feme*; for she may be assenting. 43 E. 3. 23.]

Ibid. pl. 22 cites 44 Aff. 13. in the same words with pl. 12. and cites 44 Aff. 13. but it is a mistake; for that it is quite a different point.

2. He that has a *special property* of the goods at a certain time, shall have a general action of trespass *against him that has the general property*, and upon the evidence damages shall be mitigated. 13 Rep. 69. Per Cur. in the case of **HEYDON v. SMITH**, cites 21 H. 7. 14. b.

Le. 87. pl.
110. S. C.
by name of
GLOSSE v.
HAYMAN;
and the

3. Trespass lies against a *servant* who is *intrusted with his master's goods*, if he takes them away; and if he imbezzles them it is felony; per Anderson. Godsb. 72. pl. 18. Mich. 29 & 30 Eliz. Bloffe's case.

Court were clearly of opinion, that trespass vi & armis lies against such servant. — Ow. 52. S. C. — See Master and Servant (M. 2) pl. 3.

4. There is a *difference* between an *interest* and *authority*; for if a man has authority to do a thing in general, an action of trespass lies; but where a man has an interest during such time, his *misfeasance* shall not be punished by a general writ of trespass. But in case of a *tenant at will*, if he *cuts down the trees*, or pulls down the houses, a *general action of trespass* lies; for thereby his interest is determined, and he is become a stranger; for that he voluntarily had done such an act which could not be done by his interest, and determines his will; per Popham Ch. J. and judgment accordingly. Cro. E. 784. pl. 22. Mich. 42 and 43 Eliz. C. B. in case of the Countess of Salop v. Crompton.

See (Q) pl. 5.
(U) pl. 2.

(R. 2) *Against whom. Commander, or Servant, or both.*

S.P. That it
lies against
the com-
mander; per
Mowbray.
Br. Bille,
pl. 20. cites 3 Aff. 14.

1. **I**F a man *commands another to do a trespass*, and he does it, and dies, action lies against the commander for the trespass, and he might have joined both in one and the same writ of trespass. Br. Trespass, pl. 148. cites 21 H. 6. 39.

But if I
command
him to dis-
train, and he
distraints a
horse, and

2. If I *command my servant to distrain* for me, which he does, and brings to me the distress, *and I work or occupy it*, trespass lies against me, but not against the servant. Br. Trespass, pl. 211. cites 21 H. 7. 22.

rides upon it, trespass lies against him, and not against me; for trespass does not lie against him who does only a *lawful act*, but against him who does unlawfully, or trespasses. Br. Trespass, pl. 211. cites 21 H. 7. 22.

(R. 3) Against whom. *After Trespassors.*

1. **I**F a man takes my horse with force, and gives it to S. or if S. takes it from him with force, in this case I shall not have trespass against the second offender; for the 1st offender had gained property by the tort; per Brian J. and his companions. Br. Trespals, pl. 358. cites 21 E. 4. 74. S. P. And so of lands. Contra in appeal against a second felon, as appears elsewhere; for a felon does not claim property as a trespassor does; quod nota. Br. Trespals, pl. 256. cites 38 Aff. 9.

(R. 4) Against whom. Disseisor or his Feoffee, See (T).
&c. *Persons in by Title.*

1. **I**N trespass, the defendant justified, because the prince seised the body and land of the plaintiff, as guardian by chivalry, and granted to the defendant, by which he entered and did the trespass; and the plaintiff said that his father held of the prince in socage, prift, and so de son tort demesne, &c. And per Cur. because the plaintiff acknowledges the holding of the prince in socage, therefore if he seised as guardian, and granted to the defendant who did the trespass, action of trespass does not lie against the grantee, by which he ought to answer to the grant made to the defendant; quod nota. Therefore it seems that without regress trespass does not lie no more than against feoffee of disseisor. Br. Trespals, pl. 46. cites 44 E. 3. 18.

2. If a man disseises me and makes a feoffment, and I re-enter, I shall not have trespass against the feoffee; for he is in by title, and no trespassor to me, by the best opinion. Br. Trespals, pl. 35. cites 34 H. 6. 30. S. P. Ibid. pl. 436. cites 13 H. 7. 15. by all the justices, except Wood and Vavisor.—— Where disseisor makes a feoffment, and so over, the disseisee shall have trespass against the 20th feoffee if he re-enters; per Fortescu & Danby; quod Littleton & Spilman, omnino negaverunt; and that trespass lies against the disseisor only, and against no feoffee, but the disseisee shall recover for all the time; quod Pole concessit. For before the statute of Gloucester, damages were not given in assise, but against the disseisor only, and not against the tenant. Br. Trespals, pl. 202. cites 37 H. 6. 35.

3. So of the second disseisor, by some. Quære inde, for he is in by tort. Br. Trespals, pl. 35. cites 34 H. 6. 30.

4. But where disseisor commands his servant to do an act upon the land, and I re-enter, trespass lies against the servant, by the best opinion. Quære. Br. Trespals, pl. 35. cites 34 H. 6. 30.

5. If the disseisee enters upon the feoffee or lessee of the disseisor, he shall not have an action of the trespass for the same trespass against the feoffee or lessee, because they come in by title. And at common law, before the statute of Gloucester, no damages for mean occupation against the feoffee or lessee; by all the justices. Het. 66. Hill. 3. Car. C. B. Symons v. Symons.

(S) Trespafs. What shall be *sufficient Possession* to maintain the Action. [Of Land.]

[1. **A** Man who has a *franktenement in law*, if he has not the actual possession, cannot have action of trespafs.]

[2. *As the heir shall not have trespafs against the abator, before he has entered.* 19 H. 6. 28. b.]

[3. If a man be *disseised*, he may have a writ of trespafs for the trespafs done in the disseisin, *without re-entry*; for he himself was seised at the time of the disseisin, which is sufficient possession to maintain the action. 19 H. 6. 28. b. All agreed.]

[4. *But if a man be disseised, he shall not have writ of trespafs for any trespafs done by the disseisor before re-entry*, because then the franktenement was in the disseisor, and not in the disseisee. 19 H. 6. 28. b.]

[5. So he cannot have trespafs against any stranger for any trespafs done by him after the disseisin without re-entry, because he had not any possession at the time. 19 H. 6. 28. b.]

6. If a man dies *intestate*, and the *bishop sequesters the goods*, and *J. N. disturbs him*, the ordinary shall have trespafs by reason of his possession. Br. Trespafs, pl. 83. cites 7 H. 4. 18.

7. *But where he sequesters by office or contumacy*, there he has no possession, and there he shall not have trespafs. Note the diversity. Br. Trespafs, pl. 83. cites 7 H. 4. 18.

Br. Ordinary, pl. 5. cite S. C.

S. P. that there he has no possession, but this shall go

to the spiritual court; for the ordinary, by the possession as above, shall have trespafs; but he shall not have debt; and yet he to whom he commits the administration shall have debt; for this is by statute, which gives it to the administrator, and not to the ordinary, as it seems elsewhere. Br. Ordinary, pl. 5. cites S. C.

8. In trespafs the defendant said, that A. and B. were seised in fee to the use of the plaintiff, and that the *plaintiff sold the land to the defendant for 20l. by which he entered and made a feoffment*, and did not say whether he paid the money, nor whether a day of payment was agreed between them, and then no bargain, per Yaxely, and then this does not change an use. But, per Fineux, it is a good bargain, by reason that the *vendee entered and took the land*, and made a feoffment. But Brooke queries of his opinion, because *it is not delivered to him*: nevertheless he says it seems to him, that if a man pleads that he has *bought any thing*, it shall be *intended a lawful buying*, without special matter shewn to the contrary, by these words *emisset*, &c. for if it be not a perfect bargain, then *non emebat*. Br. Contract, &c. pl. 18. cites 21 H. 7. 6.

9. If *tenant for life surrenders to him in reversion out of the land*, to which *he agrees*, the franktenement by this is immediately in him, and he is tenant to the action to be brought by *præcipe quod reddat*, without entry; but he shall not have trespafs without entry. Br. Surrender, pl. 50. cites 21 H. 7. 7.

10. If *lessee for life or years cuts timber and sells it*, the lessor may have action of trover or trespafs, though he never was possessed of them. See Maeresine (A) pl. 3.

11. A. levies *fine* to B. *sur conusance de droit*, &c. Now the conusee has possession in law, but not in fact; and if *before the entry of conusee J. S. enters, and dies seised*, he has no remedy, for he had no possession in fact, so as he might have assise or trespass. 2 Le. 147. pl. 182. in case of BERRY v. GOODMAN. Per Coke [464] Arg. and he said, that so the law is now taken.

12. If A. intrudes upon the possession of the king, and B. enters upon him, A. shall not have trespass for that entry; for he who is to have and maintain trespass ought to have a possession, which in such case A. has not, for every intruder shall answer to the king for his whole time, and every intrusion supposes the possession to be in the king; per Anderson Ch. J. which all the other justices agreed, except Periam, who doubted of it; and Rhodes J. said, and vouched 19 E. 4. to be that he cannot in such case say, in an action of trespass, *quare clausum suum fregit*. 4 Le. 184. pl. 284. Mich. 30 Eliz. in C. B. Anon.

13. He that claims an estate by virtue of the statute of uses ought to have an actual possession before he can have trespass, per Walmfley and Glanvil. Noy, 73. Green v. Walwyn.

14. There is an actual possession in law, and an actual possession in fact. As if a man bargains and sells lands, presently the bargainee hath actual possession; he may surrender, assign, attorn, and release; yet he cannot upon this possession bring a trespass, and so he hath no such actual possession, but the actual possession which gives him power to bring an action for the profits. Per Bridgm. Ch. J. Cart. 66. Pasch. 18 Car. 2. C. B. in case of Geary v. Bearcroft.

(T) Trespass by Relation. What shall be sufficient Possession to have the Action by Relation [and after Restitution for Trespass done Mesne].

[1. AN executor shall have trespass for trespass done to the goods of the testator mesne between the death of the testator and the probate of the testament; for the interest was in the executor before probate. 18 H. 6. 22. b.]

Br. Relation, pl. 46. cites S. C.—A. made a will, and the plaintiff executor; administration was granted to the defendant, who took the goods; the plaintiff proves the will and then brings trespass against the defendant, for taking of these his goods; for now by the probate it is a will, and the plaintiff executor from the death of the testator. And by the whole Court clearly, an executor shall have trespass vi & armis before seisin, because he has a property by being made executor; and this action well lies, otherwise an administrator may trick any executor, by getting the goods into his hands before probate of the will. And so judgment for the plaintiff. 2 Bulst. 268. Mich. 12 Jac. Fister v. Young.

[2. [So] an administrator shall have action of trespass for trespass done to the goods of the testator after his death, before the administration granted to him; for the relation may settle the possession ab initio, so that he may have the action. 36 H. 6. 8. dubitatur. 18 H. 6. 22. b.]

Br. Relation, pl. 34. cites S. C.— Ibid. pl. 46. cites S. C. S. C. cited Mo. 132. pl. 278. in case of Bosvil v. the Corporation of Bridgwater.—Fitzh. tit. Administrators, pl. 2. cites S. C.—Br. Relation, pl. 13. cites 36 H. 6. 8. S. P.

[3. If a man abates after the death of the ancestor, after the heir has entered he shall not have trespass against the abator for the trespass done before his entry, for it cannot so relate to settle the possession in him ab initio, where he had not any before. Contra 19 H. 6. 28. b.]

[465] [4. If the testator dies intestate possessed of goods which after his death comes to the hands of a stranger who converts them, and after administration is granted, yet the administrator may have a trover and conversion for those goods upon this matter shewn, because the administration relates to settle the property of the goods in him from the death of the testator. P. 11 Car. B. R. between WHITTINGSTALL AND SIR MILES SANDS, adjudged this being moved in arrest of judgment after verdict for the plaintiff, where it was alleged the testator died the first of August 3 Car. and the conversion the 3 August 3 Car. and the grant of the administration Sept. 5 Car. But it was alleged that Sept. 5 Car. the administration was granted, and that after scilicet 3 Aug. 3 Car. the defendant converted, and so that which comes after the scilicet will be void. But the Court did not insist upon it, but upon the other matter before, scilicet the relation. Intratur Tr. 10 Car. Rot. 702. P. 11 Car. it was affirmed per Curiam in writ of error, in the Exchequer Chamber.]

He who does a trespass after the disseisin shall not be punished by the first disseisee; per Cur. Br. Trespass, pl. 348. cites 20 E. 4. 18.

5. If a man be disseised, after his re-entry he may have action of trespass against the disseisor for any trespass done by him after the disseisin; for by his re-entry his possession is restored ab initio, and all times after. 19 H. 6. 28. b.]

[6. So after his re-entry, he may have action of trespass against any stranger for a trespass done after the disseisin. 19 H. 6. 28. b.]

Ow. 112. S. P. Gawdy, to which Popham and Fenner agreed, but Clench contra. Pasch. 38 Eliz. B. R. in case of Holcombe v. Rawlins. —Cro. E. 540. pl. 3. S. C. accordingly.

[7. As if B. disseise A. and C. disseise B. and after A. re-enters, he shall have trespass against C. for his first entry, for he has by this re-entry reduced the possession to him ab initio. H. 39 El. B. R. agreed between HOLCOMBE AND RAWLINS. Contra, Co. 11. LIFORD, 51.]

Mo. 461. pl. 644. S. C. accordingly agreed upon argument by all the justices. —

[8. So if a disseisor leases for years, or life, or gives in tail, or enfeoffs B. upon whom the disseisee re-enters, he shall have trespass against the lessee for his first entry, though he comes in by title, because by relation, the disseisee has been always seised of the land. H. 39 El. B. R. between HOLCOMBE AND RAWLINS, adjudged upon demurrer. Contra, Co. 11. LIFORD, 51. Contra, 13 H. 7. 15. b. 16.]

Ow. 111. S. C. adjudged. —

—Cro. E. 540. pl. 3. S. C. accordingly.

9. In writ of damages, it was said that for any trespasses done upon the land after the judgment given, the party may have action of trespass; quære how this is to be understood, for if it be in plea of land, where his entry is tolled, he shall not have trespass before execution; but if he was in possession; and a man enters and does trespass, which continues pending the writ, it seems that

that there he may have trespass for trespass done after the judgment. Br. Trespass, pl. 312. cites 7 E. 4. 5.

10. Where a man was attainted by one parliament and after was restored by another parliament, as if no such former act had been. [The question was] whether the patentee shall punish a trespass done mesne between the attainder and the restitution. Per Brian, he shall not have trespass for the mesne trespass; but Vavisor and others contra. Br. Trespass, pl. 270. cites 4 H. 7. 10.

S. P. Br. Trespass, pl. 425. cites 10 H. 7. 22. Where the patentee brought trespass against him who was

attainted and restored; and he pleaded the act, and the plaintiff demurred; and it was adjudged that the plaintiff should take nothing by his writ.

After attainder annulled by parliament, the party attaint shall punish mesne trespasses. Mo. 132. pl. 178. in case of Bosvil v. the Corporation of Bridgwater, cites 3 H. 7. and 13 H. 7. Saintleger's case.

11. And if a man recovers erroneously, and he who lost does a trespass upon the land and after reverses the judgment, he who recovered first shall * not have trespass; per Fineux and Rede; for per Rede, it shall be recouped in the restitution of the profits, as where a lord disseises his tenant, the tenant brings assise and recovers, the rent due to the lord shall be recouped in the damages. Br. Trespass, pl. 270. cites 4 H. 7. 10.

* [466] But where a man reverses a judgment for error, and has restitution with the mesne profits, yet he who

lost shall have trespass of the mesne trespass. But per Brian, this is because he is charged to restore the mesne profits. Br. Trespass, pl. 270. cites 4 H. 7. 10.

(U) What Act or Thing shall be said a Trespass of Battery.

Fol. 555.

[1.] If A. comes in aid of B. who beats me, though A. does nothing against me, yet he is a trespassor as well as B. 22 Aff. 43. adjudged. 27 Aff. 4.]

[2. If a man commands another to beat me, and he does it accordingly, he is a trespassor as well as he who did it. 22 Aff. 59.]

Qui facit per alium, facit per se.

(X) Trespass. What Act shall be said a Trespass.

[1.] If a man enters into my house against my will, it is a trespass, though the door be open. 11 H. 4. 75. b.]

But not if he that enters be the

landlord, and comes in to see if waste be done. Br. Trespass, pl. 97. cites S. C. — Br. Replication, pl. 12. cites S. C.

So if a man buys beasts in a market, and in driving them along the street they enter my house, this is a trespass, though the doors are open; for I am not bound to keep my doors shut; per Danby and Choke. 10 E. 4. 7. b. pl. 19.

2. If a man has land adjoining to the king's highway, and another drives cattle in the way which enter the close in default of inclosure of the owner, which he and those que estate, &c. have used to inclose time out of mind, and they are freshly pursued and chased back, this is not a trespass punishable. 10 E. 4. 7. a. pl. 19.

3. If grain grows in a common field near the way, and the beasts feed, the defendant shall render damages; for there the plaintiff is not bound to inclose; per Danby and Littleton. Br. Trespass, pl. 321. cites 10 E. 4. 7.

As where a man shooting at butts kills

4. The intent shall not be construed in trespass. Contra in felony; per Rede Ch. J. Br. Trespass, pl. 213. cites 21 H. 7. 27.

T. N. it is not felony; per Rede Ch. J. Br. Trespass, pl. 213. cites 21 H. 7. 27.

So where a tyler drops a stone which kills a man not knowing it. Br. Trespass, pl. 213. cites 21 H. 7. 27.

But in those cases, if they lame or hurt a man trespass lies; for there the intent is not to be construed. Br. Trespass, pl. 213. cites 21 H. 7. 27.

And where executor takes of the goods of J. N. amongst the testators, trespass does not lie; for the executor, prima facie, cannot know the goods of the testator from another's goods; per Rede Ch. J. Br. Trespass, pl. 213. cites 21 H. 7. 27.

5. If another's sheep are amongst my sheep, I may chase them to a strait, so that I may sever them; for they cannot be severed but at a strait; per Rede Ch. J. Br. Trespass, pl. 213. cites 21 H. 7. 27.

[467]

See Nuisance, (L) (M).

6. Every continuance of a trespass is a new trespass. See D. 319. b. pl. 17. MOORE v. THE LADY BROWNE, where in trespass on the case the turning of a water-cock put into a main pipe, which carried the water to the house of another, and which water-cock was put into the pipe by a predecessor of the defendant, was adjudged a new diversion.

7. Note for a rule, that in all trespasses there must be a voluntary act, and also a damage, otherwise trespass does not lie. Per Doderidge J. Lat. 13. in case of Millen v. Hawtry.

Carth. 436. 3. C.

8. Causing a superfluity of water by pulling down the defendant's own wear to drown or overflow the land or fishery of the plaintiff, is a plain trespass. Ld. Raym. Rep. 272. 274. Mich. 9 W. 3. Courtney v. Collet.

9. If a dog breaks a neighbour's close, the owner will not be subject to an action for it; per Holt Ch. J. Ld. Raym. Rep. 608, Mich. 12 W. 3. in the case of Mason v. Keeling.

11 Mod. 115. B. C. & P. by Holt Ch. J. in delivering the opinion of the Court, cites 29 E. 3. 74.

10. Disturbing H. in the use of his franchise, is a trespass. 2 Salk. 594. pl. 3. Trin. 6 Ann. B. R. in case of the Queen v. Soley, cites 29 E. 3. 18.

(X. 2) Where Trespass lies, though for an Act in itself lawful. Want of Care, &c. to avoid it.

1. **T**RESPASS quare vi & armis clausum suum [fregit, &c. & herbam suam] pedibus ambulando consumpsit in 6 acres, the defendant as to all, except the 6 acres, pleaded not guilty, and to the 6 acres actio non; for he said he had an acre in which a hedge of thorns is adjoining to the said acre, and at the time of the trespass he cut his thorns, and they ipso nutu fell into the acre of the plaintiff, and the defendant came freshly into the acre, and took them, which is the same trespass, &c. and the plaintiff demurred. And by the best opinion, and almost all, it is no plea; and per Choke J. it is no plea that ipso nutu they fell upon the land of the plaintiff;

tiff; for he ought to say that he could not do otherwise, or that he did all that he could to save them out. Br. Trespass, pl. 310. cites 6 E. 4. 7.

2. But where the wind blows my tree upon the land of my neighbour, I may take it, and this is no trespass; for this is the act of the wind, and not of me; per Choke Just. Br. Trespass, pl. 310. cites 6 E. 4. 7.

S. C. cited Arg. Lat. 13. in case of Millen v. Hawtre.

(X. 3) Trespass or Trespaffor. What, or who. By Consent, Agreement, or Sufferance, &c. See (Q) pl. 5.

1. If a man says that he will disseise J. N. to my use, and I say that I am content, he is sole disseisor, and this is no command but sufferance. Br. Disseisin, pl. 15. cites 21 H. 7. 35.

2. If a man says to me that he will beat J. S. and I say do as you will, this is no tort in me. Br. Disseisin, pl. 15. cites 21 H. 7. 35.

3. A. requests B. to take goods of C. if B. takes them A. is a trespaffor. See 1 Salk. 409. pl. 9. Hill. 9 W. 3. B. R. in case of Britton v. Cole.

(X. 4) What shall be said Trespass, and what Felony. [468]

1. A Man took the feme of another by rape, with the goods of the baron, and it was adjudged felony, and well, as seems to me; for though the taking of the feme be not felony, they remain therefore in the custody of the feme as the goods of her baron, and when he took the feme and the goods, this is felony in him. Br. Corone, pl. 77. cites 13 Aff. 6.

2. And the like was adjudged before of a vicar who took feme and goods, and was delivered to the ordinary by his clergy. But this seems to be where the feme is taken against her will; but quere if the feme takes the goods, and go with another man with his good will. Ibid. and so is 13 E. 4. 9. where the feme took and delivered them to W. N.

(Y) Trespass. Against whom it lies. Gift of the Action, [Trespass or Detinue.] See (Y. 2), pl. [10.] 14. in the notes.

[1. HE that comes to the goods by delivery of the plaintiff, cannot be charged in trespass; but he ought to have detinue. 43 E. 3. 30.] Fitzh. tit. Trespass, pl. 187. cites S. C.

Trespass, and not Detinue.

[2. If A. possessed of goods, sells them to B. and after P. leaves them in the possession of A. and after A. delivers them to C. to carry to another place, who carries them there accordingly. B. shall not

have trespass *against* C. upon this, but *detinue*; because he came to the goods under the delivery of the plaintiff himself. 16 H. 7. 2. b. 3. Per Curiam.]

It is a good plea, that the plaintiff delivered the goods to him for safekeeping,

judgment of the writ, if it be in one and the same county; for this proves, that he ought to have action of detinue. Br. Trespas, pl. 33. cites 34 H. 6. 5.

[4. He who comes to the thing by the law, cannot be charged in trespass.]

[5. As if a man comes to goods by delivery of the sheriff upon replevin sued, trespass does not lie against him. 44 E. 3. 20. b.]

Br. Trespas, pl. 54. cites S. C.

[6. If goods are cast into the sea by tempest, and a stranger takes them, and delivers to the servant of the owner, for the profit of the owner, no trespass lies against him. 46 E. 3. 15.]

Ow. 120. S. C. and the point was, that the constable took a felon who had robbed

[7. If a constable takes my goods lawfully into his possession, to the use of the owner, upon waiver of them by a felon, though he afterwards refuse to deliver them to me upon demand, yet no trespass lies against him, but detinue. Trin. 4 Ja. B. R. between WALGRAVE AND SKEGNES.]

B. of 20l. and found the 20l. about the felon, but because the place where he took the felon was of no strength, he was carrying it to another town, but was robbed by the way; and whether he should be charged in trespass was the doubt. Williams J. held, that he ought to keep the money safely, and because he did not, he is liable to this action. Popham said, he might have pleaded not guilty; for he said, that if a town has the possession of my goods a detinue lies, and not a trespass: but if a stranger takes them out of their possession, there a trespass lies; and therefore he conceived, in this case, that the plaintiff should have brought trover and conversion, and not a trespass, quod all justiciarii concesserunt; and therefore the case was deferred till next term, to be argued upon the general issue.

*[469]

† Fol. 556.

Cro. E. 777. pl. 10. S. P.

agreed by

Popham and Fenner in the case of the Countess of Salop v. Crompton, S. C. — Cro. E. 784. pl. 22. S. C. and S. P. For the privity of the lease is determined by the doing such act.

S. P. in S. C. agreed by Popham and Fenner. Cro. E. 777. — 11 Rep. 82. a. S. P. per

Cur. cites Litt. fol. 15. and 11 H. 4. 17. a. and 23. b. — Litt. f. 71. S. P. — Co. Litt. 57. S. P. and says, that I may have action of trespass on the case for this conversion, either the one or the other at my election.

If a man has my beasts to draw in the plough, and kills them, I shall have trespass; per Moyle. Br. Trespas, pl. 295. cites 2 E. 4. 4.

Contra if they are bailed to him, and he kills them; per Moyle. Br. Trespas, pl. 295. cites 2 E. 4. 4.

10. In trespass it is a good plea, that T. S. was seized of the house, and made him executor, by which he entered, and took the chest in the declaration. Per Thorp: the first possession of the goods and chest is in the executor, though evidences are in the chest; for they cannot

cannot know what is in it till it be opened, and if charters are in the chest, the heir may have thereof an action of *detinue*, but *not trespass*; quod Cur. concessit. Br. Trespas, pl. 396. cites 43 E. 3. 24.

11. If a man *distrains*, and after the tenant offers the rent, and the lord refuses it, the tenant shall have *detinue* of the distress, but not *trespass*; but if the lord kills the beasts, or labours them, *trespass* lies. Br. Trespas, pl. 29. cites 33 H. 6. 26. 27. Br. Detinue de Biens, pl. 10. S. C.

12. If a man takes my goods as a trespassor, I may have *replevin*, though the trespassor has property by tort; for this is of the property which I had at the time of the caption. But I cannot have *detinue*; for this is of property which is in me at the time of the action taken; per Brian. Br. Replevin, pl. 36. cites 6 H. 7. 9.

13. Where the sheriff levies the condemnation, and does not return the writ, action of *trespass* lies; per Kingsmill J. Br. Faux Imprisonment, pl. 12. cites 21 H. 7. 22.

14. *Detinue* does not lie of *hawks, hounds, apes, or monkeys*, or such like, which are things of pleasure, and are made tame, and were *feræ naturæ*; and yet *trespass* lies of them well, and the plaintiff shall recover damages of the taking; per Brudnell, & non negatur. Br. Detinue de Biens, pl. 44. cites 12 H. 8. 5. Br. Property, pl. 44. cites S. C.

(Y. 2) Trespass, and not Case.

[1.] [10.] If toll be taken by a miller of one who ought to be toll-free, general *trespass* lies, not action upon the case; for it is as illegal as if he had taken the moiety. * 41 E. 3. 24. b. † 44 E. 3. 20.] [470]
See (L) pl. 4.--Actions, (M. & N. c) pl. 36, 37.
* Br. Action sur le Case, pl. 14. cites S. C. — Fitzh. tit.

Action sur le Case, pl. 31. cites S. C. — Br. Trespas, pl. 41, cites S. C.

† Br. Action sur le Case, pl. 19. cites S. C. — Br. Trespas, pl. 47. cites S. C. — Fitzh. tit. Brief, pl. 579. cites 40 E. 3. 20.

[2.] [11. If a man takes a servant out of my service, and retains him, *trespass* lies against him. † 11 H. 4. 23. b. 24. Tr. 15 Ja. between WHETELY AND STONE, agreed per Curiam in writ of error at Serjeant's inn. 39 E. 3. 38. Adjudged. 43 Aff. 9.] † Br. Action sur le Case, pl. 38. cites S. C. — Br. Labourers, pl. 21.
21. cites 11 H. 4. 21, 22. S. P. Trespas vi & armis lay at common law. — Br. Trespas, pl. 92. cites 11 H. 4. 23. S. P.

[3.] [12. But if he does not take him out of my service, but procures him to go out of my service, and retains him, *trespass* does not lie against him, but case; for he does not do it contra pacem. 11 H. 4. 23. b.] Br. Labourers, pl. 21. cites 11 H. 4. 21, 22. that trespass

vi & armis did not lie in this case at common law, but that action on the case did.

[4.] [13. If a servant departs out of my service, no *trespass* lies against him. 11 H. 4. 23. b.] No action in this case lay against the
retainer at common law, and for that reason the statute of labourers was made. Br. Labourers, pl. 21. cites 11 H. 4. 21, 22.

Hob. 180.
pl. 215. S.C.

[5.] [14. If a serjeant of London, or *bailliff* in a counter, takes a man upon a *capias* in process at my suit, and J. S. rescues him out of his possession, I may have a general writ of trespass against him, because the serjeant is my servant to this purpose, as well as servant to the king; and therefore the taking out of the possession of the serjeant, who is my servant, is a taking out of my possession. Tr. 15 Ja. between WHEATELY AND STONE adjudged in a writ of error at Serjeant's-inn. See the same case Hobart's Reports, 242. and at Serjeant's-inn there were cited these precedents. Mich. 34, 35 El. B. R. Rot. 169. ASHTELL AND RUDGE adjudged in point. Mich. 42, 43 El. Rot. 468. B. R. PATTINGER AND MARRIOT. Mich. 37, 38 El. Rot. 192. between † FENNER AND PLASKET, both adjudged in point.]

† Cro. E.
459. bis, pl.
2. Hill. 38
Eliz. B. R.

S. C. but not S. P. — Mo. 422. pl. 584. S. C. but not S. P.

Hob. 180.
pl. 215. in
case of
WHEAT-
LEY v.
STONE,

[6.] [15. But in the case aforesaid, I may have action on the case at my election. Tr. 15 Ja. between SPEERE AND STONE adjudged, and the judgment affirmed in writ of error at Serjeant's-inn, at the same time that the general action was affirmed.]

sic S. C. that though the rescous were laid *vi & armis*, yet it would bear either trespass *vi & armis*, or trespass upon the case; but the plaintiff must beware that he follow his original, if it be by writ; for if that be *vi & armis*, or upon the case, the judgment must be suitable. And so it must be in a bill in B. R. * but if the bill be trespass general, neither *vi & armis*, nor upon the case special, he may use it to either.

* [471]

Cro. J. 501.
pl. 11. S. C.
adjudged;
for the ac-
tion is not
brought in
respect of
the harm
done to the
feme, but

[7.] [16. If a man beats the feme of J. S. by which he loses the consortium of his feme, J. S. alone, without naming his wife, may have a general action of trespass against him for the battery of the feme *per quod consortium amittit* by 2 months, though this action be grounded upon the loss of the consortium. Mich. 16 Ja. B. R. between GUY AND LIVESEY adjudged by admittance, that the general action of trespass lies.]

It is brought for the particular loss of the husband's, for that he lost the company of his wife, which is only a damage and a loss to himself, for which he shall have this action, as the master shall have for the loss of his servant's service.

S. C. cited
Cro. J. 502.
pl. 11. in the
case of GUY
v. LIVESEY,
AND CUNEF
as adjudged

[8.] [17. So the baron alone may have a general action of trespass for menacing and battery of the feme *per quod negotia sua infecta remanebant*. Tr. 27 El. B. R. Rot. 227. between CHOLMLEY v. LIVESEY, AND CUNEF adjudged.]

38 Eliz. in B. R. And another precedent was cited to be in the Exchequer in DOWLIS's case, that such an action was adjudged good.

Cro. E. 374.
pl. 24. DAY
v. BIS-
BICH, S. C.
says it was
moved that
the action lay
not against
the defend-

[9.] [18. If the sheriff upon a writ of extent takes a furnace fixed to the land, and sells it to J. S. and he takes it, no action of trespass lies against J. S. though it be admitted that the sheriff could not lawfully sell that which was fixed to the land; for J. S. comes to it without any tort done by himself. Hill. 37 El. B. between DAY v. AUSTIN AND BISBICH, per Curiam.]

ant, because he has it by the delivery of another, and not by his own taking; but that this matter was not much insisted upon, because he was present, and took it, and so he was an immediate trespassor; and cites 42 E. 3. 6. 2c H. 7. 13. and 21 H. 6. 26. — Ow. 70. S. C. says, that the Court held it a good discharge. — Cro. E. 398. pl. 3. S. C. but not S. P.

10. Where a man lends beasts to another to compester his land, and a stranger takes them, trespass lies vi & armis; but *contra* if the owner takes them within the term; for there lies only action upon the case; for if trespass vi & armis should lie, he should recover the value against the proper owner; per Hank, quod Hill & Culpepper concefferunt. Br. Trespass, pl. 92. cites 11 H. 4. 23.

11. In debt against 2, as executors, where the one is not executor, and he appears and confesses, and the other makes defence, and the plaintiff recovers, the other shall have *desceit*, but not trespass; for he is party to the judgment; per Littleton. Br. Trespass, pl. 180. cites 9 E. 4. 13.

Br. Action
sur le Case,
pl. 66, cites
S. C.

12. If a man lends his horse to ride to York, and he rides further, trespass general does not lie, for this is the authority of the party, but trespass upon the case; but where he misuses the authority of the law, he shall have trespass general; as if a man distrains, and kills the distress, &c. Br. Trespass, pl. 327. cites 12 E. 4. 8. per Brian.

13. In trespass the defendant justified entering into the house by licence of the plaintiff; and the plaintiff said, that he broke his door and windows, of which he has brought his action, and no plea; for of licence in fact, as here, he shall not have general action of trespass, but upon the case. Br. Trespass, pl. 359. cites 21 E. 4. 75, 76.

Contra of licence in law, and misdemeanor after, as entering into a tavern to drink,

and taking the bowl, or entering to see waste, or to distrain, and after breaking the walls, or killing the distress, there lies general writ of trespass. *Contrary* above of licence in fact. Ibid.

14. If a man distrains beasts, and impounds them; and another takes them, he who distrains shall not have general action of trespass; for he has no property. *Contrary* of goods bailed; quære of estray. Br. Property, pl. 52. cites 20 H. 7. 1.

15. A. lessee for years of a house, demised it for 6 months, and afterwards permitted him to occupy the house for 2 months longer, during which time he pulled down the windows, &c. A. brought case against him; it was objected that the action did not lie, because it was the plaintiff's folly to let him continue tenant at sufferance; and if any action did lie, it was trespass. The Court conceived that either case or trespass lay, but that case was the most proper action to recover so much as he was damaged, because he himself is subject to an action of waste; and judgment for the plaintiff. Cro. C. 187. pl. 7. Pasch. 6 Car. B. R. West v. Treude.

[472]
Jo. 224. pl.
4. S. C. by
name of
WEST AND
TREUDE,
adjudged
una voce
that the ac-
tion lay.

16. It was holden, that where an action is brought by the master for beating his servants, by which he lost his service, that this is trespass vi & armis, and not upon the case; but in this case the master shall not have damages for the beating, but for the loss of service only. Clayt. 17. pl. 27. Aug. 1633. Swallow v. Stephens.

17. In an action for stopping a rivulet, and drowning a close, and thereby spoiling the trees, it was held, that case lies for him in reversion, and trespass for the tenant in possession; but during the term the reversioner cannot have trespass, that being founded only upon the possession. 3 Lev. 209. Hill. 36 and 37 Car. 2. C. B. Biddlesford v. Onslow.

18. Trespass quare vi & armis, for a nuisance in *laying dung, and causing stinking water in his yard to run to the walls of the plaintiff's house, and by piercing them run into his cellar.* After a verdict it was moved, that trespass vi & armis does not lie against the defendant for this, because a man cannot be a trespassor with force and arms in his own ground; but that he ought to have brought an action on the case. The Court seemed to be of opinion against the plaintiff; but afterwards they gave judgment for him, after great wavering in opinion, pro & con. Hard. 60. Trin. 1656. in the Exchequer. *Preston v. Mercer.*

The Court agreed this case to be good law; for the plaintiff turned that which was properly trespass into an action

19. In case the *plaintiff* declared, that he *was possessed of a close, and the defendant dug pits in it, &c. per quod. &c.* And after verdict for the plaintiff it was adjudged, that the action will not lie; because the cause of action was properly trespass, for which the party might have an action of trespass, but could not turn it into an action upon the case. Arg. Ld. Raym. Rep. 188 East, 9 Will. 3. in case of SHAPCOTT v. MUGFORD, cites Hill. 4 and 5 W. and M. in C. B. Thornton v. Austen.

upon the case, only with design to evade the statute of 22 and 23 Car. 2. and to get full costs, though the damages were under 40 s. Ld. Raym. Rep. 188. in case of Shapcott v. Mugford.

[Y. 3] [In what Cases, and at what Time, Trespass lies, where the Matter is Felony.]

Qw. 70. S. P. per Cur. in S. C. that trespass will not lie against the vendee, but a detinue.

[1.] [19.] If a stranger takes my horse, or other goods, and sells it to J. S. and J. S. takes it accordingly, no action of trespass lies against him. Hill. 37 El. B. in the said case of DAY. Per Curiam.]

Fol. 557.

[2.] [20. No trespass lies, because it appears to the Court to be felony; for this appertains to the king only to punish, Tr. 4 Ja. B. R. HUGGIN'S CASE.]

* [473] S. C. cited by Roll Ch. J. Sty. 347. in case of Dawkes v. Covenigh.

[3.] [21. As action of trespass does not lie for the baron for battery of the feme, by which the feme languished by six weeks, and then *died of the stroke; for this is felony. Tr. 4 Ja. B. R. HUGGIN'S CASE, adjudged.]

Noy, 82. S. C. The Court held the plea in bar naught, because it does not shew, that the plaintiff gave evidence for the conviction; because otherwise he shall not have

[4.] [22. [So] If A. robs B. of 3000l. of money in bags, for which he is after indicted and convicted, and after B. brings trespass against A. for taking of the money, and he pleads this matter in bar, it seems that the action does not lie; because, when it appears that the act was felony, the party ought to sue him by way of appeal, if he will have his goods again; or prosecute him by indictment, and then he shall have his goods again by the statute of 21 H. 8. for otherwise no one will prosecute felony for the public good, to punish such offenders, but only to have trespass for his private interest. Contra, Mich. 2 Car. B. R. between MARKHAM AND COBBE, by Doderidge and Whitlock; but Jones e contra, because he cannot aver against the verdict. But it seems he may

aver

aver against it, he being a stranger to it. *Intratur*, P. 1 Car. Rot. 112. The bar was adjudged ill upon the pleading, not upon the matter in law.]

restitution, and an allegation of procurement is not sufficient ;

and for that reason judgment was given for the plaintiff.——Jo. 147. pl. 6. S. C. agreeable to Roll, together with the reasons of Jones ; and in the conclusion says, *quere bene* ; for it is a point of great consequence as well of the one part as of the other.——Lat. 144. S. C. and the defendant in his bar having averred, that it is the same offence, it was said by Doderidge to be ill ; because by the indictment it was found burglary, and here it is only trespass, which cannot be the same offence ; but he might have averred, that it was for the same caption. And Jones and Whitlock agreed to this, though they differed as to other matters.——S. C. cited per Roll. Ch. J. Sty. 347. in case of *Dawkes v. Covenigh*.

[5.] [23. So in *trespass of goods taken*, if it appears upon evidence that it was felony, it seems the action does not lie for the cause aforesaid, and yet he cannot plead it. Contra in the said case of *MARKHAM*. Agreed per Curiam.]

[6.] [24. If *A. enters into the house of B. and there robs him feloniously*, and after *B. indicts A.* for this felony, and upon not guilty pleaded he is found guilty, and has his clergy, and is burnt in his hand, and so delivered ; in this case *B. may bring an action of trespass against A.* for entry of his house, and taking 300l. of his money ; for here is not any inconvenience by it, for he has prosecuted him according to the law as a felon, at the suit of the commonwealth, and it was a trespass also to the party ; and therefore there is good reason, that he shall have recompence for the wrong done to him also, inasmuch as he has done his duty in the prosecution, according to the law, for the felony at the suit of the king. M. 1652, between *DAWKES AND CAVENNAUGH*. Adjudged per Curiam upon a special verdict in London. *Intratur*, Hill. 1650. Rot. 653.]

Sty. 346. S. C. accordingly ; but Roll Ch. J. said, that the action would not lie before conviction, for the danger that the felon might not be tried ; and since the party robbed could not have his remedy before,

he shall not lose it now ; for now there is no danger of compounding for the wrong ; and the rest of the justices agreed with Roll, and so judgment was given for the plaintiff.—See (A. a) pl. 3.

* Orig. is (*bien publique*).

(Y. 4) Trespass, or Trover.

See (Z) pl. 5. the note.

1. **T**HE defendant's bailiff seized the plaintiff's beast for an *heriot*, where none was due. The defendant agreed to the seizure, and converted the beast : whereupon the plaintiff brought trover. It was insisted, that the property was gone by the taking, so as the plaintiff cannot dispose of the beasts, and therefore the proper action is trespass. And of this opinion was Daniel ; but others e contra, and that he had election to bring either of the actions at his pleasure. And so it was adjudged for the plaintiff. Cro. J. 50. pl. 21. Mich. 2 Jac. C. B. *Bishop v. Lady Montague*.

Cro. E. 824. pl. 25. Patch 43 Eliz. C. B. S. C.

[474]

2. In trespass, &c. the plaintiff declared, that he was robbed of 20l. and that he pursued the robber to such a town, and there shewed him to the defendant, who was constable, and he apprehended him, and finding the 20l. about him took the same, and detained it in his possession. The defendant confessed the taking the 20l. as above, but that it being a place of no strength, he was carrying it to the

next.

next town, and was robbed of the money. Popham thought the plaintiff should have brought trover, and not trespass, to which the other justices agreed. Owen. 120. Mich. 3 Jac. B. R. Walgrave v. Skinner.

(Z) Trespass. Of what Thing.

[1. **T**HE obligor may have trespass *vi & armis* against the obligee, for taking of the obligation. 20 H. 6. 24. b.]

2. If he who has charters breaks the seals, trespass lies. Br. Trespass, pl. 29. cites 33 H. 6. 26, 27.

* Trespass of a bound taken, and the defendant demurred in law, and the plaintiff recovered 6s. 8d. for costs and damages, notwithstanding that the bound be a beast of pleasure, and fere naturæ, and of which a man does not pay tithes, and appeal of felony does not lie thereof, nor action of detinue: but if a man takes it and kills it, trespass lies; for when it is made tame the master has thereof a property, and it may be pleasure or profit to the owner, as to guard his house, or to kill deer or vermin, &c. quod notæ. Br. Trespass, pl. 407. cites 12 H. 8. 3.

3. Trespass lies of a couple of * bounds, and of partridges, and pheasants taken; but he shall not say *ad valentiam*. Br. Trespass, pl. 315. cites 8 E. 4. 5.

4. Trespass by the Lady Wiche against the parson of D. who took a coat armor, certain pendants with the arms of Sir Hugh Wiche her baron, and a sword in a chapel where he was buried; the parson said that he took them as oblations. Yelverton said, I have a seat in the chancel, and have a carpet, book, and cushion, and the parson shall not have those choses in action. Per Pigot, the parson cannot take a grave-stone. Quære, for by the reporter oblations shall be taken according to the intent of the donor. Br. Trespass, pl. 181. cites 9 E. 4. 14.

For the taking of a hawk (re-claimed) a man shall not have trespass, but trover and conversion. And the count ought to be that he is reclaimed; and is not sufficient to say he was possessed of him as of his proper goods. F. N. B. 86. (L) in the new notes there (f).

5. Trespass lies of a hawk, popinjay, thrush, ape, &c. which are made tame. Br. Trespass, pl. 507. cites 12 H. 8. 3.

6. If a man draws wine out of the vessels and puts water in the same to fill them up again, he shall have an action of trespass. F. N. B. 88. (F).

7. In trespass for taking a greyhound with a collar; the defendant pleads that the dog was courting an hare in his land, and therefore he took and led him away. Whereupon the plaintiff demurred; and adjudged for the plaintiff, because the plea is frivolous. Whereby it seems trespass lies. Cro. J. 463. pl. 10. Hill. 15 Jac. in B. R. Athil v. Corbet.

[475] 8. Trespass will lie against a man for frightening another out of his money. As where several persons threatened to send A. to Newgate by colour of a warrant, and to indict him of perjury unless he would give them money and a note, which he did through their threats. And every extortion is an actual trespass. Per Holt Ch. J. 11 Mod. 137. Mich. 6 Annæ B. R. the Queen v. Woodward.

(A. a) Trespass. At what Time it lies.

[1. **I**F a man marries my niece I shall not have trespass supposing the trespass at the day after the marriage, for then she was free by marriage before. 46 E. 3. 6.] Fitzh. tit. Labourers, pl. 24. cited S. C.

[2. If a man takes my goods, and after I grant them to another, yet I may have trespass for the taking. 42 E. 3. 2.] If one takes my goods, and afterwards I have my goods again, yet I may have a general action of trespass, and upon the evidence the damages shall be mitigated. 13 Rep. 69. per Cur. in case of HAYDON v. SMITH, cites it as the better opinion in 11 H. 4. 23.

3. It was agreed, that if a man be indicted, arraigned and acquitted of robbery of J. S. he shall not have thereof trespass; for the trespass is extinct in the felony, and omne majus trahit ad se minus; quære inde. Br. Trespass, pl. 415. cites 31 H. 6. 15. See (Y. 3) pl. [6] 24.

4. If an act be made felony by statute, as hunting or the like, and after a man offends in it and then the act is repealed by statute, there the hunting is dispunishable; for there the law by which it shall be tried is repealed. But where trespass is done upon a termor, and after the term expires, the trespass is punishable; for there the interest expires, but not the law. And so see a diversity where the interest expires, and the law remains, and where the law is repealed and does not remain. Br. Corone, pl. 202. cites 2 M. 1.

5. If I limit uses and revoke them and limit new uses, the uses settle without entry or claim; yet not so as to bring action of trespass. Per Bridgman Ch. J. Cart. 78. Trin. 18 Car. 2. C. B. in case of Thomasin v. Mackworth.

(A. a. 2) At what Time. Before Possession had by the Plaintiff of the Thing taken.

1. **I**F a man have waif and stray within his manor by prescription, and another man takes the waif or stray out of the manor, &c. he who has the manor shall have an action of trespass for them, &c. and that without any seisure of them before. F. N. B. 91. (B).

2. If a man have a wreck by prescription, or by the king's grant, &c. if goods be wrecked upon his lands, another takes them away, he who has the wreck shall have an action of trespass quare vi & armis for this taking without seisure thereof before. F. N. B. 91. (D).

3. If an abbot or other man has a hundred, and has all felons goods within the hundred, if any felon within the hundred be attainted, and the sheriff takes the goods of the felon within the hundred, he who has the hundred and such liberty shall have an action of trespass against the sheriff for the goods which the sheriff took, and the same shall be quare vi & armis, &c. F. N. B. 91. (F).

Fol. 558.

(B. a) Trespass. In what Cases it may be justified.
Justification for the Public Good.

2 Bulst. 60.
S. C.—Cro.
J. 321. S. C.
—Brownl.
224 S. C.

See tit.
Hunting,
(A) pl. 4.

For the
common-
wealth a
man may
justify tres-
pass as to en-
ter the land
of J. N. to
make a bul-
wark, &c.
per Kingm.
Justice. Br.
Trespass,
pl. 213. cites
21 H. 7. 27.

[1. IN trespass for entering his land *pedibus ambulando* for hunting and digging the land, the defendant cannot justify this, and the digging of the land by reason of the hunting a badger, and to draw him out of his hold, though he fills up the hole again with earth afterwards, though it be for the public good. Tr. 11 Ja. B. R. between GEDGES AND MINN.]

[2. In a trespass *quare clausum fregit & herbam*, &c. The defendant cannot justify this trespass for cause of hunting the fox. Mich. 37 B. between NICHOLAS AND BADGER by Fenner.]

3. Trespass for digging his land, the defendant said that it is 4 acres adjoining to the sea, in which all the men of Kent have used time out of mind when they fish in the sea, to dig in the land adjoining, to pitch stakes to hang their nets to dry. Nele said he ought to shew what men. Per Choke and Littleton, this is no custom; for it is contrary to common right and reason. But per Danby, fishers may justify the going upon the land to fish; for this is for the common weal, and for the sustenance of several, &c. and it is the common law, *quod fuit concessum*; but per Fairfax the digging is the destruction of the inheritance, therefore it is no custom, &c. Br. Customs, pl. 46. cites 8 E. 4. 18, 19.

4. Trespass of cutting of grass, the defendant said that there is such a custom in the county of Kent, that when any enemies come to the sea it is lawful for all the men of Kent to come upon the land adjoining to those same coasts, in defence and safe-guard of the country, and there to make their trenches and bulwarks for the defence of the same country, and said that at the time of the same trespass enemies came, &c. by which they dug to make trenches and bulwarks, &c. Per Jenney this is at common law to do so in defence of the realm; but Catesby contra inde, &c. *quære*. Br. Customs, pl. 45. cites 8 E. 4. 23.

5. Every man may arrest a nightwalker; for this is for the commonwealth; per Hufley and Fairfax. Br. Trespass, pl. 416. cites 5 H. 7. 5. —And so it was agreed, 4 H. 7. 18.

6. In trespass for taking his horse; the defendant justified by virtue of a commission directed to the constables by the post-master general, and that the constables made a warrant to him; and held good. Noy, 114. Garrons v. Banbury.

7. In trespass for flinging down materials erected towards the building of a house; the defendants pleaded that the erection was for building a house upon the king's highway, and that they threw down the materials. And Holt Ch. J. seemed to agree that the throwing down the nuisance was justifiable. Comb. 417. Hill. 9 W. 3 B. R. Lovey v. Arnold.

(C. a) Trespas. Imprisonment justifiable. By Officers upon Warrants.

[1. IF the sheriff arrests a man upon process, and lets him to bail, and after returns a cepi corpus, and after a habeas corpus comes to the sheriff to remove the body, the sheriff cannot justify the re-taking of him upon this writ, after he had let him to bail before, but he ought to aid himself upon the bail. Mich. 10 Car. B. R. between LAY AND STRUT per Curiam in action of false imprisonment upon such re-taking.]

[2. In a false imprisonment against a tipstaff of B. R. for imprisoning him for 3 months, if the defendant justifies for 6 hours because he was a servant to Sir John Lenthall, the marshal of B. R. and appointed by him to attend and execute the commands of the chief justice of B. R. for the time being, and that there is a custom a tempore, &c. that such servant so appointed by the marshal for the time being, had used to execute the commands of the chief justice, &c. and that after upon complaint of J. S. to Sir Thomas Richardson then chief justice, against the plaintiff, according to the custom in such case for the chief justice for the time being, a tempore, &c. usitatam, the said chief justice mandavit eidem marescallow quod caperet the plaintiff & eum salvo custodiret ita, quod haberet eum coram eodem capitali justiciario quandocunque, &c. ad respondendum de & super his quæ ei ex parte dicti domini regis abjicerentur in ea parte. By force of which warrant he took the plaintiff as servant to the marshal and by his command, and detained him by the space of 6 hours, and after, at the end of the 6 hours, delivered him to the said marshal salvo custodiendum quousque. This is a good justification, though this warrant was by parol and not in writing, it being by custom, and though no cause was expressed in the warrant, inasmuch as it is alleged to be according to the custom, and it may be greatly prejudicial to the king's service to express the cause in the warrant; and though the warrant is *ita quod haberet eum coram eodem capitali justiciario quandocunque, &c.* yet it is good; for it is usual in warrants of sheriffs to be with an, &c. * and the signification of the words *quandocunque, &c.* is *quandocunque* the party, who complains, will complain against him, and though the defendant does not make any answer, what the marshal did with him after his delivery of the plaintiff to his custody, but he only says, that he is not confusant of it, yet the plea is good; for if the marshal afterwards detains him unjustly, yet the defendant is excused, because he has done legally before. P. 11 Car. B. R. between Sir GEORGE THROGMORTON AND ALLEN adjudged upon a demurrer. Intratur, Tr. 11 Car. B. R. Rot.]

* Fol. 559.

3. In false imprisonment, the defendant said that the commission of the king such a day was directed to him and others to take those who were notoriously slandered for felonies or trespasses, notwithstanding that they were not indicted, and this is against law, and that the plaintiff had wounded J. N. to death by which they took them, &c. And admitted

If a commission issues to take J. S. which is contrary to law, and thereupon

W. R. takes him, yet he shall be excused of trespass as to this act, by this void commission. Br. Trespas, pl. 372. cites 42 Aff. 5.

mitted for a good justification, though the commission be against law, quod nota; and [though] a man to whom the commissioners directed their precept to take the plaintiff made this justification upon the matter, and not the commissioners themselves. Br. Faux Imprisonment, pl. 9. cites 24 E. 3. 9.

[478] 4. It was agreed arguendo, that where a *capias* issues to the sheriff without an original, and he serves it, false imprisonment does not lie; for it is not the default of the sheriff; per Hank. in trespass. Br. Faux Imprisonment, pl. 31. cites 11 H. 4. 36.

5. In debt it was said by Hill J. that if the sheriff takes a man by *capias*, and does not return the writ, false imprisonment lies; but not against the bailiff, if the sheriff does not return the writ; for the default of the sheriff shall not condemn the bailiff as it is said elsewhere. Br. Faux Imprisonment, pl. 5. cites 11 H. 4. 58.

5. per Paston. ——— A common bailiff arrests a man by the sheriff's warrant, false imprisonment lies against the sheriff, and also against the bailiff, if the sheriff does not return the writ; but if the bailiff of a liberty makes such arrest, he shall not be punished though the sheriff never returns the writ; because he is not servant of the sheriff; for the sheriff can make no other return than the bailiff of the liberty certifies him. Per Frowike Ch. J. but per Rede Ch. J. if a common bailiff makes arrest, and his master does not return the writ, the master shall be punished and the bailiff not. Kelw. 89. pl. 12. 22 H. 7. Anon.

If the sheriff does not return the *capias*, false imprisonment lies; but otherwise it is of an attachment of goods out of an inferior court, because the *capias* is conditional, but the attachment general. Arg. Lat. 223. in case of Turvil v. Tipper cites 14 H. 7. 14. per Keble.

Fieri facias & *capias ad respondendum*, which have these words, *ita quod habeas corpus ejus hic ad respondendum*, &c. ought to be returned in pain of action of false imprisonment; but *contra* of *capias ad satisfaciendum*, which has no such words in it. Br. Faux Imprisonment, pl. 12. cites 21 H. 7. 22. per Kingmill J.

6. In trespass of imprisonment, the defendant justified by warrant of the peace to him directed to make the plaintiff to find surety of the peace. And it was held that he shall say first, that he required him to find surety, and he would not, by which he arrested him; for he shall not arrest him if he does not refuse to find surety, and there it is agreed that he may arrest him diverse times; for if he arrests him, and he breaks from him, he may retake him, and so several times; quod nota. Br. Faux Imprisonment, pl. 18. cites L. 5 E. 4. 12.

If a constable has a warrant to bring a person before a justice of peace to find surety of the peace, and upon refusal to carry him to goal, &c. if upon carrying the person before a justice he refuses to give security, the officer without any new warrant or command may carry him to prison by virtue of the words of the warrant, viz. (and if he shall refuse, &c.) 5 Rep. 59. a. b. Hill. 32 Eliz. B. R. in a note of the reporter in Foster's case, alias Foster v. Smith.

7. In false imprisonment, the defendant justified the imprisonment for a quarter of an hour by *capias* directed to the sheriff against the plaintiff, who commanded the defendant to arrest him, by which he took him and did not shew precept. Per Moyle, where the sheriff comes to arrest a man he need not shew *capias*, but if the defendant demands his warrant, he ought to shew his warrant; but Choke said, no; for the sheriff or bailiff errant who is known and sworn, needs not shew warrant, for the party is bound to take constance thereof; but where the sheriff commands another to arrest the party,

party, he ought to shew warrant; for otherwise the party may make rescous. Br. Faux Imprisonment, pl. 23. cites 8 E. 4. 14.

8. A man may justify in false imprisonment inasmuch as *supplicavit* came to the sheriff, and he awarded warrant to the defendant to take him, which he did, and yet the sheriff cannot give his power to another to take surety there. Br. Faux Imprisonment, pl. 34. cites 9 E. 4. 30.

9. If action be brought against J. N. son of W. N. if the sheriff by *capias* arrests J. N. son of T. N. action of false imprisonment lies, though the party, who is arrested, be the same person against whom the plaintiff has cause of action, which was agreed arguendo in detinue. Br. Faux Imprisonment, pl. 38. cites 10 E. 4. 12.

10. If the sheriff of London arrests a man in London by *capias* directed *vicecomitibus Midd.*, writ of false imprisonment lies. Br. Privilege, pl. 44. cites 16 E. 4. 5.

11. Where a justice of peace awards warrant of the peace, and the officer arrests him, and will not suffer him to come before such of the justices of the peace which he chooses, to find surety of the peace, the party shall have action of false imprisonment against the officer; per Fineux Ch. J. Brooke says, *quære inde*; for as it seems, it is at the discretion of the officer to carry him before such justices as he will. *Quære*, if the officer of malice will carry him to a justice who inhabits 40 or 60 miles distant, where there are other justices of peace who inhabit within two leagues [or 5 or 6 miles] of the place where he arrested him. *Quære*, if action upon the case does lie or not. Br. Faux Imprisonment, pl. 11. cites 21 H. 7. 21. [479]

12. If bailiff, by precept of the sheriff, arrests a man, and does not carry him to the sheriff, false imprisonment lies; per Kings. J. Br. Trespass, pl. 211. cites 21 H. 7. 22.

13. A justice of peace cannot make a warrant to arrest a suspected person, unless he be indicted; and yet if he does make such warrant, and the bailiff serves it, he shall be excused; for they are justices of record. Br. Faux Imprisonment, pl. 33. cites 14 H. 8. 16. *S. P. And this is a good justification for him, notwithstanding that the justice erred in awarding the process.* So where the sheriff errs in his warrant, directed by him to the bailiff of franchise. So of his own bailiff; by 3 justices, and after Fitzh. the fourth justice did not deny it. Br. Faux Imprisonment, pl. 8. cites 14 H. 8. 16.

14. If the sheriff takes J. S. by force of process awarded out of a court, which has not jurisdiction of the principal cause, he is a trespasser. But otherwise if the court has authority of the principal case; there if the process be misconceived, it is only erroneous; per Manwood Ch. B. 2 Le. 89. pl. 112. in case of Ognel v. Paston. *Bar Trin. 34 Car. 2. B. R. it was said by the Ch. J. and agreed to by the Court,* that if an arrest be by process out of an inferior court, in a cause not arising within their jurisdiction, the party arrested may have action against the plaintiff, who shall be intended consant where the cause of action arose; but not against the judge or officer who has entered the plaint, or the officer who has executed it, but the proper and just remedy is against the plaintiff. 2 Jo. 214. in the case of Olliet v. Bessy.

15. If the plaintiff commands the sheriff to discharge the defendant before his imprisonment, and makes to the sheriff a release of that suit, and yet the sheriff imprisons the defendant, it is false imprisonment. And per Doderidge J. if the case be, that the sheriff has

3 Bulst. 95. S. C.—Roll. Rep. 240. S. C.

has no consance of the plaintiff, and therefore refuses to discharge the prisoner, he must plead so. Cro. J. 379. pl. 7. Mich. 13 Jac. B. R. Withers v. Henly.

16. If the *sheriff has not any writ, and makes a warrant* to J. D. to arrest J. S. action lies for this arrest against J. D. and the sheriff also. Per Jones J. Jo. 379. Hill. 11 Car. B. R. in Girling's case.

S. C. cited by Sir John Powell, baron of the Exchequer, in his argument in the case of *GWINNE v. POOLE*, 2 Lutw. 1565, 1566. but says, that this certainly is only process *inverso ordine*,

17. Where a *capias* issues out of an inferior court, and *no summons was first issued*, though upon a writ of error, this matter is not assignable, because a fault in the process is aided by appearance, &c. yet false imprisonment lies upon the arrest. And an officer cannot justify by process out of an *inferior court*, in like manner as upon process out of the *courts at Westminster*. For suppose an attachment should go out of the county court without a *plaint*, could he that executes it justify? Yet a sheriff may justify an *arrest upon a capias out of C. B. though there was no original*. But † ministers to the courts below must see that things be duly done; per Hale Ch. J. and judgment accordingly. Vent. 220. Trin. 24 Car. 2. B. R. in case of *Read v. Wilmot*.

and only *erroneous*, and that it was so held in the case of *WARD v. ELLIN*, Cro. J. 261. and so in *Palm. 449. MARGET v. HARVEY*, and that no custom of any inferior court will make this process good, and cites 2 Roll Abr. 277. *BANKS v. PEMBLETON*, nor would it be so by the custom of London, but that it is confirmed by act of parliament, and otherwise would be only erroneous; that where process issues out of an inferior court without *plaint*, it is only error, cites 4 Le. 78. *SAVAGE AND KNIGHT*. And nota, there is no authority cited by Hale to support the judgment in the case of *READ v. WILMOT*, and there seems no reason that officers of inferior courts should be * more knowing than those of superior courts, to judge of the legality of process under the peril of being subject to an action, and that it would be hard doctrine; but the true reason, why they are not liable, is, where the court or judge has jurisdiction of the matter, they are only ministers, and cannot dispute the legality of the mandates directed to them.

† S. P. by Mallet J. Mar. 118. pl. 195. Mich. 17 Car. in case of *DYE v. OLIVE*; but Heath J. contra. And Bramston Ch. J. confessed, that it was hard to punish an officer for his obedience to what he is bound to do; and that if he does an act by command of the Court, whether the act be just or unjust, he is excused, in case the Court has jurisdiction; but otherwise he is liable to an action of false imprisonment. But the case was adjourned.

* [480]

2 Show. 148. pl. 137. Hill. 32 and 33 Car. 2. B. R. adjournatur. S. C. by the name of *Colcot v. Belchey*.—*Ibid.* 204. pl. 214. Trin. 34 Car. 2. S. C. by the name of *Oliet v. Bessy*.

18. If a *bailiff of a liberty arrests J. S. out of the liberty*, and delivers him to the gaoler of the liberty, who detains him, yet the *gaoler is not liable* to an action of false imprisonment; for he knew not that the arrest was tortious, nor is he obliged to inquire about it. And if he had been *informed of it, (without being of the coun or practice in it,)* yet he ought to detain J. S. being delivered to him with a good warrant for the arrest, though the execution of it was illegal; for had such information been false, the gaoler, by letting J. S. at large, would be liable to an escape. And a judgment in C. B. was reversed. 2 Jo. 214. Trin. 34 Car. 2. B. R. *Oliet v. Bessy*.

Bessy, adjournatur.——S. C. cited per Powell J. in case of *Gwin v. Pool*. Lutw. 1568.——*Skim. 40. ELLIOT v. BRER*, S. C. in B. R. and it was argued against the judgment in C. B. that if the gaoler had suffered him to depart after the bailiff had brought the prisoner to him, it had been an escape: and likewise if the gaoler had refused him, it had been an escape; so that to punish the gaoler for an escape if he refuses him, and for false imprisonment if he receives him, is unreasonable. And though their main reason in C. B. was, for that the bailiff of a liberty and the gaoler were but one officer, yet it is plain that is a mistake, as was said here by the Court; and they said, that in this case the gaoler should be punished for doing but his duty, and yet be without any remedy. It was said by the Court, that in this case, though notice had been given to the gaoler, yet it were not material. Upon this the Court pronounced their reversal, nisi.——*Lambert & Oliet v. Bessy*, Raym. 431. S. C. argued

Argued by Raymond J. who conceived the judgment ought to be affirmed.——Raym. 467. *BRETT V. OLLIET*, S. C. and the same argument of Raymond J. in support of the judgment of C. B. but says the other 3 judges resolved, that the gaoler was not chargeable, because he could not have notice whether the prisoner was legally arrested or not, and yet he is compellable to take him into his custody, and if he lets him go it will be an escape.——S. C. cited by Powell J. 2 Lutw. 1568. in the appendix, in the case of *GWINN V. POOL & AL.* That the gaoler not being privy to the tort, shall not be punished for doing his duty in keeping his prisoner.

19. If an officer intermeddles in, or does nothing but what belongs to his office, he is not liable to precedent tortious acts. 2 Jo. 214. *Olliet v. Bessy*.

20. If an action be brought in an inferior court for a matter which does not arise within its jurisdiction, and the defendant be arrested thereupon, yet no action will lie against the officer that arrested him, though it will against the plaintiff. Skin. 131. pl. 6. Mich. 35 Car. 2. B. R. per Cur. in the case of *Hudson v. Cook*. Vent. 369. *HODSON V. COOKE*, S. P. in S. C. and says, that so it was said to be resolved 18 Car. 2. in the Exchequer, when Ld. Ch. J. Hale sat there, in the case of *Cowper v. Cowper*.——2 Show. 328. pl. 335. S. C. but not S. P.——S. C. cited 2 Lutw. 1568. by Powell J. in his argument in the case of *GWINN V. POOLE*, and says he knows not any authority against it, unless the case of * *MARTIN V. MARSHALL*, in Roll's Rep. which he says is a mis-report of that case, because the Ld. Hobart, who was Ch. J. when this judgment was given, reports it otherwise.

* Hob. 63. pl. 64 and 2 Roll. 109, 116.

21. If one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has, is his justification; per Holt Ch. J. 12 Mod. 387. Pasch. 12 W. 3. B. R. in the case of *Dr. Greenville v. College of Physicians*.

22. If upon an *escape-warrant* a prisoner is taken by the mob, without any officer, and delivered to the sheriff, per Holt, it is as if there had been no warrant at all; nor can the sheriff detain him by grafting legal imprisonment on an illegal one; if he does, false imprisonment will lie against him. He is bound not to receive him from any body but the constable, or other peace-officer; but if such affirms himself to be a constable, he must believe him, [481] and make return accordingly; per Holt Ch. J. 6 Mod. 154. Pasch. 3 Ann. B. R. in case of *Rich v. Doughty*.

(C. a. 2) Imprisonment. Justification. By Officers by Warrant. Pleadings.

1. **D**ECEPTUS *de facie* is no excuse for the sheriff's arresting a wrong person by virtue of a writ. Arg. in the case of *WALE V. HILL*. Bulst. 149, cites 13 H. 4. 2. per Hankford.

2. In false imprisonment the defendant justified, because B. F. justice of peace, &c. found the plaintiff guarding a manor with force and arms, and arrested him, and sent him to the gaol of L. where the defendant was constable, by force of a warrant, &c. made to him by the said justice to receive him, by which he received and imprisoned him there, prout, &c. which is the same imprisonment. Yelverton said, de son tort demesne absque tali causa, and held no plea; for the

defendant justified by matter of record. Yelvert. de son tort demesne, absque hoc that he imprisoned him by force of the precept. Newton; as he had a precept, it shall be intended that he did it by virtue thereof. Yelverton said, *he imprisoned him, absque hoc that the justice of peace made to him any precept*; and the others e contra. And because it was dubious how this matter should be tried, whether per pais, or by certificate of the justice to certify it upon a writ to him directed, therefore he said, *that de son tort demesne, absque hoc that the justice of the peace illic ei misit*; and the others e contra. Br. De son tort, &c. pl. 16. cites 21 H. 6. 5.

3. And in 16 E. 3. the defendant justified to make execution for damages recovered; and the other said, *that de son tort demesne absque tali causa*. And the issue received, and P. 18 E. 3. accordingly; *for notwithstanding his authority, he may take the goods de son tort demesne*. Nota bene, and study of the best; and see the book for the pleading of the bar above at large. Br. De son tort, &c. pl. 16.

* In trespass of assault, wounding, taking, and imprisoning, the defendant as to the taking and imprisoning justified by a warrant from the lord mayor; but shews neither time or place when or where it was made. And per Cur. a place ought to be alleged

4. In false imprisonment the defendant said, *that capias issued out of the Exchequer against the plaintiff to the sheriff of M. to take the plaintiff; by which he took and imprisoned him, by virtue of a warrant to him directed thereupon by the sheriff, the defendant being a bailiff sworn and known*. And the plaintiff demurred, because the defendant did not shew * place where the warrant was made, and did not shew if the sheriff † returned the writ or not. And as to the place it is good by the best opinion; for if the plaintiff denies the warrant, the defendant may rejoin, that it was made at D. &c. And as to the return, it is good; for the bailiff cannot compel the sheriff to return the writ; but this is the default of the sheriff. But where the sheriff himself justifies, he ought to allege, that he has returned the writ; but per Rede J. the defendant ought to say, *that he returned the body to the sheriff, or brought the prisoner to him*. And then a good justification, & adjournatur. Br. Faux Imprisonment, pl. 12. cites 21 H. 6. 22.

where the warrant was made. Roll. Rep. 135. pl. 15. Hill. 12 Jac. Wilson v. Dodd.—Ibid. 176. S. C. accordingly, and admitted by Coventry of counsel for the defendant.

† In trespass of imprisonment the defendant pleaded, *that he took the body as servant of the sheriff, and by his command*. And well, without shewing that his master had returned the writ; for *the laches of the master shall not prejudice the servant*; but contrary of the master himself; per Littleton. Br. Trespass, pl. 339. cites 18 E. 4. 9.

[482] 5. Trespas. If a serjeant arrests a man, and one comes in aid of him, or if the party shews to the serjeant, or the sheriff, the man who shall be arrested, there, in trespass of false imprisonment, the serjeant, or he who shews or comes in aid, justifies as above. There the plaintiff shall not say, *that de son tort demesne absque tali causa, against the one or the other*; but shall traverse *absque hoc that he had such capias, or made any rescous, or such like, &c.* Br. De son tort, &c. pl. 19. cites 2 E. 4. 6.

6. In false imprisonment the defendant justified, *that he at another day, after the day in the declaration, arrested him by warrant of the peace, and carried him to the gaol, absque hoc that he was guilty before, &c.* But it was said, that the justification is no plea without

Saying that he carried him to gaol. Br. Faux Imprisonment, pl. 21. cites 5 E. 4. 5, 6.

7. In trespass the defendant justified the imprisonment by *precept*, which came from a justice of peace, by reason of a *supplicavit*. And the plaintiff said, that de son tort demesne, &c. and so to issue. Br. De son tort, &c. pl. 40. cites 9 E. 4. 31.

8. In false imprisonment the defendant justified as *sheriff of M.* and arrested him by *capias*, judgment, &c. And per Catesby, this is no plea, without answering to the false imprisonment; but it seems a good plea, if he says, that it is the same imprisonment. Br. Faux Imprisonment, pl. 29. cites 22 E. 4. 47.

9. In false imprisonment, where the *bailiff* makes an arrest, de son tort demesne, &c. is a good plea. Contra where the *sheriff* himself makes the arrest, and is prohibited. Br. De son tort, &c. pl. 53. cites 16 H. 7. 3. per Keble.

10. Faux imprisonment. The defendant justified, because the plaintiff said to J. S. that the mayor of Barnstable was a fool, which the mayor bearing of, commanded the defendant, being an officer, &c. to imprison him. And upon demurrer it was adjudged no plea; but for such words he might have bound him to his good behaviour, but was not to imprison him. Yet if the mayor had been in public place of justice, and he had called him by such opprobrious words, he might imprison him. Cro. E. 78. pl. 38. Mich. 29 and 30 Eliz. B. R. Simons v. Sweete.

11. In false imprisonment the defendant justified, that he was constable, and the plaintiff being in the presence of a justice of peace, who, not having opportunity to examine him, commanded the defendant to take the plaintiff into his custody till the next day, which he accordingly did, which is the same imprisonment. It was adjudged a good justification, though not alleged what cause the justice had to imprison the plaintiff, or any warrant in writing, it being in the justice's presence. But the justification is as proper for another as for the constable. But because the defendant justified the 16th, where the imprisonment is supposed the 15th, the plaintiff had judgment. Mo. 408. pl. 551. Trin. 37 Eliz. Broughton v. Mulshoe.

12. In false imprisonment, if the defendant justifies by a *capias* to the sheriff, and a warrant from him, there de injuria sua propria generally is no good replication; for then matter of record will be parcel of the cause, (for the whole makes but one cause,) and matter of record ought not to be put in issue. But he may reply de injuria sua propria, and traverse the warrant, which is matter of fact. But upon such justification, by force of any proceeding in the admiralty, hundred, or county courts, &c. not being courts of record, there de injuria sua propria generally is good; for all is matter of fact, and the whole makes but one cause; per Cur. 8 Rep. 67. a. Mich. 6 Jac. in Crogate's case.

13. In trespass of faux imprisonment against a sheriff and bailiff, they justified by warrant on writ to the sheriff. The plaintiff replies, that no writ was then taken out. To which the defendant demurred, and judgment pro plaintiff; for albeit the bailiff has a warrant, yet he is liable, if there be no writ. Contra if the writ be void,

void, if delivered. 2 Keb. 705. pl. 69. Mich. 22 Car. 2. B. R. Plucknett v. Grenes.

Saund. 298.

GREEN v.

JONES, S.C.

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14. Trespass of *battery and imprisonment*. The defendant *justified by a writ* out of B. R. directed to the sheriff, *and a warrant thereupon made to him*. The plaintiff demurred specially, *because it is not pleaded, that the writ was delivered to the sheriff as the usual form is*. It was answered, that it need not be so pleaded; for if in truth a writ be sued, though he made a warrant before it came to his hands, it is lawful; and the precedents are both ways, as Dr. BONHAM'S CASE, Co. 8 Rep. and other cases cited; and of such opinion was Hales and all the court, and gave judgment for the defendant. Levinz of counsel for the defendant. 2 Lev. 19. Mich. 23 Car. 2. B. R. Jones v. Green.

then the matter would come in question; but now the plaintiff by his demurrer has lost the advantage of it. And of such opinion was the Court, viz. that it should be intended, that the bill of Middlesex was delivered to the sheriff before the arrest, and before the making of the warrant; and that the plaintiff should have replied the contrary, specially if it had not been true; and that by the demurrer he has admitted the delivery of the bill, and the Court was ready to give judgment for the defendant; but gave the plaintiff leave to discontinue on payment of costs; because, in truth, the bill was not delivered to the sheriff till after the arrest, as the plaintiff's counsel informed the Court.

S. P. 3 Salk.

357. pl. 15.

Pasch. 9 W.

3. Anon.

cites 3 Lev.

69.

15. In false imprisonment, &c. the defendant *justified under a latitat and warrant, and arrest thereupon at D. absque hoc, that he is guilty at any other place or time*. The plaintiff replied *de injuria absque tali causa*. The defendant demurred, and judgment for him; because upon general demurrer it is ill to put matter of record, and fact, and variety of matters in one issue, as the warrant, the arrest, &c. Besides, the replication wanted conclusion, viz. *et petit hoc quod inquiratur per patriam*; for the replication in this case ought to make issue of itself, whereas here those words are wanting. 3 Lev. 65. Trin. 34 Car. 2. C. B. Fursdon v. Weeks.

Skin. 50.

ELLIOT v.

BESSEY,

S. C. The

Court as to

this point

said, that the

gaoler here

was a distinct

officer from

the bailiff

or steward;

and where

it had been

16. In trespass and false imprisonment, and detaining him in prison, *quousque finem fecit ad damnum 100l.* The defendant pleaded *not guilty as to all, except the imprisonment; and as to that, he justified by a non omittas, &c.* It was assigned for error, that the defendant was charged for imprisonment of the plaintiff, *quousque finem fecit pro deliberatione, which is not answered*; for the imprisonment only is justified, and not the finem fecit. But the whole Court thought the plea good notwithstanding, because he pleaded *not guilty as to all, besides the imprisonment*. Raym. 467. Trin. 34 Car. 2. B. R. Bessey v. Olliet.

objected, that the gaoler might, in this case, have action for case against the bailiff, the Court doubted of it. And where it was urged, that if the gaoler keeps one imprisoned for not paying unreasonable fees, that now the imprisonment becomes false ab initio, the Court doubted of it.

17. In trespass, assault, battery, and false imprisonment, the defendants *justified under a plaint levied against the now plaintiff in an inferior court, for a debt of 20l. and that a capias issued, whereupon he arrested him*. The plaintiff replied, *that the cause of action did not arise within the jurisdiction of the court*. And upon a general demurrer judgment was given for the defendants. 2 Lutw. 935. 1506. Mich. 4 W. & M. in the Exchequer, Gwinne v. Poole & al'.

18. In

18. In trespass of assault, battery, wounding, and imprisonment, the defendant, *as to the assault and imprisonment, justified as bailiff under a judgment and execution in an inferior court of record, and that he at D. molliter manus, &c. and arrested him, &c.* The plaintiff demanded oyer of the execution, which appeared to be sued out more than a year after the judgment; and then replied, that no execution emanavit infra annum. And upon demurrer it was resolved, that suing out the execution after the year was not void, but only voidable by writ of error; so that till it is reversed, it is a good justification. 3 Lev. 403. Mich. 6 W. & M. in C. B. Patrick v. Johnson.

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19. In trespass, assault, battery, and *false imprisonment*, the defendants, as to all but the false imprisonment, pleaded not guilty; and as to that they *justify by virtue of their charter confirmed by act of parliament, and by the statute 14 H. 8. empowering them to fine and imprison pro non bene utendo facultate medicinæ, &c. and so justify the imprisonment pro mala praxi, by a warrant in writing under the hands and seals of the censors, &c.* The plaintiff replies *de injuria sua propria, & non virtute warranti predicti, & hoc petit quod inquiretur per patriam*; and Holt Ch. J. who delivered the opinion of the Court, held the replication ill, and that the plaintiff does not say there was no such warrant, nor traverses it, but only says he was not arrested by virtue of it. If he had denied that there had been any such warrant it had been a good traverse, for then the defendant would not have had authority to arrest the plaintiff; but if the plaintiff was arrested for other cause, and not upon this warrant, then the plaintiff should have shewn the other cause; as if there were two warrants, the one good, and the other ill, and the plaintiff had been arrested upon the ill one, he ought to shew it specially, and a traverse that defendant did not take him by virtue of such warrant is ill; but he *should have traversed that there was any such warrant, or have said that it was granted afterwards, absque hoc that there was any such warrant at the time of the arrest.* Ld. Raym. Rep. 454. Easter-Term 11 W. 3. Groenvelt v. Burwell & al. Censors of the College of Physicians.

(D. a) Imprisonment justifiable by Officers. What shall be *good Cause of Justification* of Imprisonment by Officers.

[1.] *If a man comes through a vill, driving certain beasts, and a hue and cry pursues him, the bailiff of the vill may justify the imprisonment of him, &c. without other cause, that is to say, of ill fame, suspicion, or indictment.* 29 E. 3. 39. adjudged.]

[2. If an *hue and cry* be levied upon a man, it is good cause of imprisonment of him by an officer, without any other cause. 29 E. 3. 39. b.]

Br. False Imprisonment, p. 16. S. P. cites

5 H. 7. 4.—And see Robbery (Z), per totum.

Cro. E. 222.
pl. 2. Tay-
lor v. Beale,
is not S. P.
—And Le.
237. pl. 320.
S. C. is not
S. P.

[3. Upon a suit in the Chancery between A. and B. if an order be made by the Court, *that the warden of the Fleet shall take B. and imprison him for diverse contempts done to the Court till he has made an obligation to A.* and the warden of the Fleet, by force of this order, takes him accordingly, this is justifiable in an action of false imprisonment against A. who comes in aid of the warden by force of such naked commandment without writ. Tr. 39 El. B. R. between TAYLOR AND BEALE.]

[485] 4. False imprisonment against R. who came vi & armis, and beat and imprisoned him, the defendant said that he was constable, and the plaintiff beat R. almost to death, by which hue and cry was levied, and the defendant would have arrested him, and the plaintiff refused the arrest, by which the constable took power to arrest him, and the damage which he had was because he disturbed the arrest; and to the imprisonment he said, that because the plaintiff beat R. almost to death, he imprisoned him by 4 days, till he perceived that R. would live, and then he let him at large; judgment, &c. and no more is thereof said; and therefore it seems that it is a good plea. Br. Faux Imprisonment, pl. 6. cites 38 E. 3. 6. and see 38 H. 8. that a man cannot arrest him after the affray is over without warrant. Contra before the affray, and in the time of the affray, &c. And so of a justice of peace.

5. A man cannot justify imprisonment by writ *de nativa habenda*, or by *justicies*; for those are only commissions to hold plea, and the body shall not be taken but by process out of court of record, and the court of the sheriff by those is not of record. Br. Faux Imprisonment, pl. 30. cites 2 H. 4. 24.

6. If the sheriff does not return the writ, yet the servant who makes the arrest, may justify; for the act of the master shall not lose the justification of the servant, per Danby and Choke; but Moyle and Littleton contra, but agreed of the bailiff of the franchise that it shall not hurt him. And so after, that the sheriff himself cannot justify without returning the writ; and yet he may, per Choke, in case the parties notify to him that they are agreed. Br. Faux Imprisonment, pl. 23. cites 8 E. 4. 18.

7. If a man makes assault upon the constable, he may justify to arrest him who made the default, and to carry him to gaol for breaking the peace, though he himself be party, viz. the constable upon whom the assault was made; quod nota. Br. Faux Imprisonment, pl. 41. cites 5 H. 7. 6.

8. A man may arrest J. N. by command of the justices of peace, if J. N. be present in sight, and not otherwise. Br. Faux Imprisonment, pl. 33. cites 14 H. 7.

9. If a constable by warrant of the peace from a justice of peace arrests the party, and brings him to the justice, who does not put him to find surety, action does not lie against the constable. Br. Faux Imprisonment, pl. 12. cites 21 H. 7. 22.

10. Where a man arrests another, and has no warrant at the time of the arrest, but after a warrant is directed to him for this purpose, this is no cause to justify; per Cur. Br. Faux Imprisonment, pl. 8. cites 14 H. 8. 16.

11. In false imprisonment the defendant justified, for that Sir R. L. the lord mayor of London, and who was a justice of peace, commanded him, being serjeant at mace, *pro diversis causis eidem majori bene cognitis*, to imprison the plaintiff, &c. All the Court held it no good plea; for the cause of imprisonment ought to be shewn, so as the Court may adjudge whether it were lawful, or not; for though a magistrate may send for any to examine him, without shewing cause in the warrant, or telling the officer what the cause is, which might not always be proper to discover, yet when he is committed, the cause is then discovered. Cro. J. 81. pl. 4. Mich. 3 Jac. B. R. Boucher's case.

Brownl. 204, 205. Mich. 3 Jac. WOODY's case seems to be S. C. and there the Court took notice, that it did not appear whether the commitment was by the lord

mayor, as mayor, or as justice of peace; and that his power as mayor was not known to the Court, but ought to be shewn in the pleading.——S. C. cited 2 Hawk. Pl. C. 83. cap. 13. f. 11. by name of Boucher's case. And the serjeant says it seems to be holden in this case, that where an officer arrests a man by force of a warrant from a magistrate, *pro certis causis*, without shewing any cause in particular, he cannot justify himself in an action brought against him for such arrest, without setting forth the particular cause in his plea; and yet in this very report it seems to be allowed, that such a general warrant is good; and if so, it seems strange that the officer should not be justified by setting forth the truth of his case, since if there were no good cause to justify the granting of the warrant, the magistrate ought to answer for it, and not the officer.

12. In trespass of taking his servant out of his service, &c. the defendant justified that A. was possessed of corn at S. and that the servant, by command of his master, had carried the same away; and that the said A. desired the defendant, being a constable, to detain the servant until he could get a warrant from a justice of peace, &c. And upon demurrer the plea was held ill, because a constable cannot detain any person but for felony. Brownl. 198. Mich. 11 Jac. Ringhall v. Woolsey, or Welsh. [486]

13. In false imprisonment, the defendant justified, that he was sheriff of London, and having arrested one T. S. he escaped, and being in pursuit after him in February, he met the plaintiff about nine at night, who used him indocently, thrusting him against the wall, and giving him scurrilous language; and thereupon finding him wandering in the street in the night-time, and misbehaving himself, the defendant imprisoned him; and upon a demurrer it was objected, that it was ill, because *circa nonam horam* was uncertain as to the time, neither was it a time to be committed for a night-walker, it being usual for men at that time to be about business; and that the using him uncivilly is too general, and the thrusting him against the wall might be by accident. Sed per Curiam, taking it all together, the justification was good; but if it were so that the thrusting him against the wall was casual, this ought to have come in the replication, and not to have demurred; and judgment per tot. Cur. against the plaintiff. Roll. Rep. 237. pl. 8. Mich. 13 Jac. B. R. Chune v. Pyot. 2 Bull. 328. Hill. 12 Jac. S. C. accordingly.

14. In trespass of assault, battery, and false imprisonment, the defendant justified as deputy-governor of the isle of Scilly, setting forth a custom there to chastise and punish by imprisonment any soldier, &c. who neglects or misbehaves himself in his duty, or obstinately refuses to obey the orders of the governor or his deputy, and being required thereunto gives contumelious words to the said deputy governor; and then sets forth that the defendant disobeyed the orders of the de-

puty governor, and gave him opprobrious words, whereupon he imprisoned him prout ei bene licuit; and upon demurrer the plaintiff had judgment. 2 Jo. 147. Pasch. 33 Car. 2. B. R. Ekins v. Newman.

15. If a *process* be unduly obtained, and the party against whom it is had, be thereupon taken and imprisoned, an action of false imprisonment *lies* by the party imprisoned, *against him at whose suit he is imprisoned*, but not against the officer who executes it. Mich. 24 Car. 1. B. R. L. P. R. 595. tit. False Imprisonment.

(D. a. 2) Imprisonment. Justification by Officers without Warrant. Pleadings.

1. **T**RESPASS of wounding and imprisonment; the defendant *justified the wounding that it was of the assault of the plaintiff and in his defence, and the imprisonment, because the defendant is constable of the vill, and the plaintiff broke the peace upon him, by which he took and carried him to the gaol; and the plaintiff said, that de son tort demesne absque tali causa; and a good plea, because no matter of record was alleged as capias, &c.* For there de son tort demesne is no plea without more, viz. traverse of the matter. Br. De son tort, &c. pl. 18. cites 5 H. 7. 6.

2. In false imprisonment, the defendant *arrested the plaintiff without warrant, and after warrant came to him, and he justified by the warrant; and the plaintiff said that de son tort demesne, absque hoc that he had any such warrant, and gave the matter in evidence;* [487] *and the warrant was of a justice of peace to arrest him.* Br. De son tort, &c. pl. 17. cites 14 H. 8. 16.

a Roll. Rep. 109. 17 Jac. B. R. S. C. says the demurrer was because the defendant did not aver that the matter in controversy for which, &c. did arise and grow within the city, and therefore it was adjudged for the plaintiff, and for the same reason judgment was confirmed in B. R. in a writ of error, and that in

3. In false imprisonment, the defendant *justified that York was a city by prescription, incorporated by name of mayor, &c. and had time out of mind a Court of Chancery for all causes of equity arising in the city between the citizens, &c. and that the mayor had always used to direct precepts for appearance, and to imprison for contempt of orders; and that a bill was exhibited against the defendant, who being summoned did appear but refused to answer, and thereupon an order was made that he should answer or stand committed; and because he still refused to answer, the mayor commanded the defendant, who was serjeant at mace, to take him, who did so; and brought him into court, where he was in open court committed, and so justified, &c.* And upon demurrer this plea was adjudged ill, because the *prescription* being laid for the mayor to *direct precepts* for appearance, those *must be understood to be in writing*, but the precept to the defendant to arrest the plaintiff was by word only, and if that were void which is made part of the cause of the judgment the whole plea is vitious though the commitment in court was good; besides the plea is ill in substance, because a court of equity did not lie in grant and much less in prescription, as here it is alleged, it being a jurisdiction to be derived from the crown, and it had been resolved by all the judges

Judges of C. B. that the king could not grant to the queen to hold a court of equity, and that the courts of chancery in Chester and Durham are incidents to a county palatine, which had jura regalia. Hob. 63. Martin v. Marshall and Keys.

this case Serjeant Hitchen said that it was the opinion of the Court

of C. B. that a court of equity cannot be by prescription, but true it is, that in London they have such court, but their customs are confirmed by act of parliament; but e contra it was said that the Court of C. B. gave no such opinion, and that Mountague Ch. J. demanded of Hitchen, why a court of equity may not be by prescription; and cited tit. Jurisdiction the last plea, where it is held that a court of equity may be by prescription. Haughton J. said, that the cinque ports have had a court of equity by prescription; but Hitchen said that they have likewise an act of parliament for it in 7 H. 6. and that in the Chancellor of Oxford's case, it is doubted whether a court of equity may be by prescription or not.—S. C. cited 2 Lutw. 1564. in the case of GWINNE v. POOLE in the argument of Sir John Powell, who says, nota that this was for want of jurisdiction in the court as to the process, and that this was the reason of the judgment, and not for want of averment, that the cause arose within the jurisdiction of the court, as is said in Roll. Rep. 109. which report he says is certainly mistaken. And Ibid. pag. 1568. says it is misreported, because the lord Hobart, who was chief justice, when the judgment was given, reports it otherwise.

4. In trespass, the plaintiff declared that the defendant 1 Apr. &c. vi & armis assaulted, beat, wounded and imprisoned the plaintiff for 2 days, &c. The defendant, as to the assault, battery, and wounding, pleads son assault demesne; and as to the imprisonment, except for 11 hours, he pleads not guilty; and as to those 11 hours he pleads in bar that it was on the 10 January, &c. at the city of Coventry, in the county of that city, and that he was then sheriff thereof, and in the execution of his office, by watching the common goal there, lest the prisoners should escape; and that the plaintiff at 11 o'clock at night, being an unreasonable time, struck the defendant with his fist, and hindered him in the execution of his office, whereupon he, to keep the peace, imprisoned the plaintiff till the next morning, and then carried him before a justice of peace, who bound him over to the assizes, &c. And upon demurrer it was objected that the not answering to the vi & armis had made both the pleas ill. But the Court held that the vi & armis was only matter of form, and aided by the statute 27 Eliz. cap. 5. of General Demurrers. Saund. 81. Trin. 19 Car. 2. Law v. King.

2 Keb. 237. pl. 13. S. C. says that the defendant traversed absque hoc that he was guilty on the 1st of April, or at any other time before or after while he was sheriff, or at any other place. To which the plaintiff demurred. And per Curiam this traverse is sufficient, and the plaintiff

must reply, and shew if there were any other assault or imprisonment; also the traversing the time before, and after, does not lock up the plaintiff from assigning another day and place, especially the thing being local. Twisden on 2 Cro. 514. said this would be a departure. Judgment pro defendant.

(E. a) Imprisonment. For what Causes or Things [488] those Persons may be imprisoned.

[1. A Man may imprison another to prevent apparent mischief which may ensue.]

[2. As a man may justify the imprisonment of feme covert against baron because she was mad and would have killed herself, or done other mischief, as fire an house or other thing. 22 E. 4. 45. b.]

Br. Faux Imprisonment, pl. 28. cites S. C. that the

plaintiff brought action of imprisonment against the defendant for imprisoning of his feme; the defendant said that he declared [* to the feme that her baron was taken and imprisoned] for a Scot, and the feme looked as if she had been mad or lunatic, and the defendant to avoid mischief, took her and put her in his house for an hour, which is the same imprisonment. And per Fairfax J. this is no plea; for you cannot

cannot have the jury to try your conceit or mind, which cannot be, but you ought to surmise in fact that she was mad, and supposed that she would have killed herself, or done other mischief, as burnt a house.

* These words are omitted in the large edition.

S. P. Br.
Faux Imprisonment, pl. 28. cites

[3. If a man sees two men fighting, so that perhaps one would kill the other, it is lawful for him to part them, and put one in an house till the rage be over. 22 E. 4. 45. b.]

S. C.——
It is said that if a constable sees persons either actually engaged in an affray,

[4. But if he sees 2 quarrelling, and having many words as if they would fight, yet it is not lawful to take the one or the other and put in any place; for notwithstanding the words, the one will not peradventure strike the other, and so it shall be intended. 22 E. 4. 45. b.]

as by striking or offering to strike or drawing their weapons, &c. or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice of peace, to the end that such justice may compel him to find sureties for the peace, &c. or he may imprison him of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find such sureties by obligation. But it seems that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol till he shall be punished for his offence; and it is said, that he ought not to lay hands on those who barely contend with hot words, without any threats of personal hurt, and that all, which he can do in such a case, is to command them under pain of imprisonment to avoid fighting. Hawk. Pl. C. 137. cap. 63. l. 14.

† As by chastising and beating him with rods. Br. Trespass, pl. 235. cites S. C.——

[5. If a man be in a rage and does a great deal of mischief, his parents may justify the taking and binding of him in a house, and there to use him in such a manner † as shall be reasonable to reduce him to his good sense again; for it is for the benefit of the party and of all others for the mischief which he may do if he were at large. 22 Aff. 56.]

Br. Faux Imprisonment, pl. 35. cites S. C.——

——In this case the defendant justified as above, absque hoc that he imprisoned him in other manner; and the other said that de son tort demesne, &c. absque tali causa. Br. De son tort demesne, pl. 44. cites S. C.——S. P. Br. Faux Imprisonment, pl. 28. cites 22 E. 4. 45.

In false imprisonment, the defendant said that the plaintiff was lunatic, and would have killed himself, or would have burnt a house in B. by which he took and imprisoned him; the plaintiff said, that de son tort demesne absque tali causa, and the others e contra. Br. De son tort, &c. pl. 51. cites 22 E. 4. 45.

Br. De son tort, &c. pl. 44. cites S. C.——Br. Faux Imprisonment, pl. 35. cites S. C.——S. P. Ibid. pl. 44. cites 10 H. 7. 20.

6. In false imprisonment, the defendant justified because the plaintiff and others assaulted J. F. and beat him [almost] to death, by which hue and cry was made, and the defendant, as steward of the vill, him took, arrested and kept, till they were assured of the life of J. F. &c. And the other said that de son tort demesne, &c. Br. Trespass, pl. 235. cites 22 Aff. 56.

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7. A stranger cannot justify to arrest a man by command of the sheriff without precept. Br. Faux Imprisonment, pl. 23. cites 8 E. 4. 14. per Needham.

8. A man may arrest a vagrant and send him to gaol; and a good justification; per tot. Cur. Br. Trespass, pl. 184. cites 9 E. 4. 26.

Serjeant Hawkins says that any one may lawfully lay

9. If I see a man going to kill J. N. I may take and hold him from it; per Moyle and Needham. Br. Trespass, pl. 184. cites 9 E. 4. 26.

hold on another whom he shall see upon the point of committing a treason or felony, or doing an act which may

may manifestly endanger the life of another, and may detain him so long till it may reasonably be presumed that he hath changed his purpose. 2 Hawk. Pl. C. 77. cap. 12. s. 19.

10. In trespass of false imprisonment, the defendant said that the plaintiff feloniously robbed W. N. by which he took and arrested him, and delivered him to the constable of D. to carry him to gaol; and a good plea, though he does not say that the constable did carry him to gaol, contra of arrest by capias and not returning the writ; for this is upon condition ita quod habeas corpus ejus tali die, &c. Br. Faux Imprisonment, pl. 24. cites 10 E. 4. 17.

So of lord who arrests a vagrant, and does not send him to gaol; for the statute is that he shall send him to gaol, but this case

is at the common law; but per Cur. if he sends him to gaol by his servant, who suffers him to escape, action does not lie against the master; per Cur. And so if the plaintiff had been rescued out of the possession of the defendant, action does not lie for the plaintiff; for there is no default in the defendant. Br. Faux Imprisonment, pl. 24. cites 20 E. 4. 17.

11. Where a man arrests a felon, and offers him to the gaoler, and he will not receive him, the party himself may keep him. Br. Faux Imprisonment, pl. 25. cites 11 E. 4. 4.

12. In false imprisonment in B. the defendant said that he was robbed in another county, and the voice and fame was, that the plaintiff did the robbery, by which he arrested him for suspicion in the county of B. The defendant said that de son tort demesne absque tali causa; and well per Catesby; but per Brian and Townsend, he shall say that de son tort demesne, absque hoc that there was any such felony done; & adjournatur. Br. De son tort, &c. pl. 52. cites 2 H. 7. 3.

13. Where a justice of peace sees a man who will break the peace, he may take him and put him in prison, and action does not lie thereof. Br. Faux Imprisonment, pl. 12, cites 21 H. 7. 22.

And if a justice of peace sees a man breaking the peace,

and lays his hands upon him, and stays him, and lets him go at large, yet action does not lie thereof, Br. Faux Imprisonment, pl. 12. cites 21 H. 7. 22.

14. Justices of the peace cannot award warrant to arrest a man, for that he had broke the peace, but they may award warrant to arrest him for fear that he will break the peace for the future; this is not for the breaking which is past. Br. Faux Imprisonment, pl. 41.

Sergeant Hawkins says it seems clear, that regularly no private person can of

his own authority arrest another for a bare breach of the peace after it is over; for if an officer cannot justify such an arrest without a warrant from a magistrate, a fortiori a private person cannot. 2 Hawk. Pl. C. 77. cap. 12. s. 20.

15. A constable took a madman and put him in prison, where he died, and the constable was indicted of this, but was discharged; for the act was legal. Cited by Glanvill. Arg. Ow. 98. Hill. 31 Eliz. C. B. in case of BEALE v. CARTER, as a case which he heard in that court in 10 Eliz.

16. Trespass for false imprisonment; the defendant justified as constable of A. because the plaintiff brought a child of 2 months old, and laid it in the church-yard of A. to the intent to have destroyed it, or to charge the parish with the keeping of it; for which he did arrest him, and put him in the stocks. And upon demurrer it was held * a good justification; for it is an ill practice, and is good

Mo. 284. pl. 456. S. C. by name of KEALE v. CARTER, that he justified the imprisonment

with the plaintiff agreed to retake the infant; and adjudged good, because

cause to stay the plaintiff, and to imprison him; and afterwards in the same term, it was adjudged that the plaintiff nihil capiat per billam. Cro. E. 287. pl. 1. Mich. 34 & 35 Eliz. B. R. Beal v. Charter.

cause the plaintiff's intent was felonious, and the act of the constable was only an imprisonment to prevent the felony, which he might do ex officio.—Le. 327. pl. 462. Beale v. Carter, mentions the child not to be above 6 years old, and the bringing to be into the church [and so is Mo.] to be left there. Exception was taken, because the plea said (quendam infantem) without naming him, or saying (ignotum) sed non allocatur. And the plea being also, that the plaintiff intended to have left the child there, exception was taken, because he did not say that the plaintiff departed from it; besides, his intention is not traversable, nor can be tried by jurors. Wray said, if the defendant had pleaded that he stayed the plaintiff to have carried him before a justice of peace, it had been good; and Fenner said that the justification had been good, if the defendant had pleaded, that the plaintiff refused to carry away the child; so all the justices were of opinion against the plea, but they would not give judgment by reason of the ill example, but they left the parties to compound the matter.—Poph. 12. pl. 3. Anon. S. C. mentions the child not above 10 days old, and that the plaintiff left it upon the ground, to the great disturbance of the people there, and that Fenner held that what the constable did was lawful; and Popham said, that if one lays an infant, which cannot help itself, upon a dunghill, or openly in the field, so that the beasts or fowls may destroy it, the constable seeing it, may commit the party so doing to prison; for what greater breach of the peace can there be, than to put such an infant by such means in danger of his life? And what diversity is there between this case and the case in question; for nobody was bound by the law to take up the infant but he which brought it thither, and by such means the infant might perish; the default thereof was in the plaintiff, and therefore the action will not lie. And thereupon it was agreed, that the plaintiff take nothing by his writ.—Ow. 98. S. C. according to Le. 327.

Serjeant Hawkins says, it seems to be the better opinion that not only a constable, but any private person who shall see another *expose an infant in the street*, and refuse to take it away, may lawfully apprehend and detain him till he shall consent to take care of it. 2 Hawk. Pl. C. 77. cap. 12. s. 19.

17. It seems clear, that *all persons whatsoever who are present when a felony is committed or a dangerous wound given*, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect *unless they were under age at the time*. 2 Hawk. Pl. C. 74. cap. 12. s. 1.

(E. a. 2) Imprisonment. Justification. By Persons not Officers. Pleadings.

1. **TRESPASS** of imprisonment, the defendant pleaded that the plaintiff assaulted him, and would have beat him, by which the defendant came to the constable, and prayed him to arrest him to find surety of the peace, who did so, and he came in aid of the constable; judgment si actio, and admitted for a good plea in the written book. Br. Trespass, pl. 79. cites 3 H. 4. 8. 9.

2. In trespass of false imprisonment, because the defendant assaulted, beat, and imprisoned the plaintiff till he made fine. The defendant said *that actio non*; for he said that in the time of the rebellion of Jack Cade, one W. S. and other malefactors in the vill of B. where, &c. made insurrection, and would have cut off the heads of all that were not their friends, and they took the plaintiff, and carried him to the cross, and would have cut off his head, and the defendants came and laid their hands peaceably upon the plaintiff, and carried him to the house of the mayor, and prayed him to keep him in his house all that night, in salvation of his life, by which he was there all the night, which is the same assault, battery, and imprisonment of which

which the action is brought; and said that he did not make any fine, &c. And the best opinion was, that it is a good plea without saying that the rebels were there watching all the night, so that they could not let the plaintiff at large sooner than they did; and a good plea, without traversing absque hoc that they imprisoned him till he made fine; for then he traverses that which he justified before, and also the imprisonment ought to be answered; for otherwise he shall recover damages for the one and for the other. Br. Faux Imprisonment, pl. 3. cites 35 H. 6. 54.

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3. Trespass of imprisonment; the defendant justified, because he himself brought action of debt against the now plaintiff in the court of the Tower of London, and it was returned nihil, by which capias issued to the bailiff there to take the plaintiff, and the now defendant shewed the plaintiff to the said officer, by which the officer took him by his warrant, and returned cepi corpus, &c. which is the same imprisonment of which the plaintiff has brought his action; and the plea was challenged, because it is an imprisonment by the bailiff or officer who arrested him, but is no imprisonment by the defendant who shewed him to the officer; and so per Cur. it is no plea, unless he says further that he required the officer to arrest him by his warrant, by which he did it, and then this request, with the arrest by the officer, is a lawful imprisonment in him who required him; quod nota. Br. Trespass, pl. 307. cites 4 E. 4. 36.

4. Imprisonment was justified, because the defendant was in company of thieves, who had killed J. S. and the voice and fame was that he was guilty. The being in the company is traversable, but not the voice and fame; per Markham Ch. J. Br. Traverse per, &c. pl. 339. cites 7 E. 4. 20.—But see 11 E. 4. 4. 6. that the issue was taken upon the voice and fame; quod nota. Ibid.

Common fame in some cases may be a good justification, as appears by 2 H. 7. 5. 26 H. 8. 9.

7 E. 4. 20. But this is to be understood, if the cause for which he was taken be public, but not where the cause is private, as for taking a man's goods in a private manner, there he must shew specially that the goods were found with him, and in his possession, and not to go by belief, and to give credence to every particular man, but he must shew some good and apparent cause to the court. Arg. Bull. 149. and says so is 7 E. 4. 20.—Ibid. 150. per Croke J. The difference is where an offence was committed, and suspicion withal, common fame will excuse, but not where no such offence was committed, in case of Wake v. Smith.

5. In trespass the defendant justified the imprisonment of the plaintiff, because he assaulted J. N. to have robbed him, by which the defendant took him and put him in the stocks. The plaintiff said that de son tort demesne absque tali causa; and a good plea, and so to issue. Br. De son tort, &c. pl. 39. cites 9 E. 4. 27.

6. Trespass of assault, battery, and imprisonment at E. the defendant said that a man was robbed by J. S. and R. such a day, who came to the house of the plaintiff, and the constable arrested the plaintiff, because he had suspicion of him, and because he would not obey him, he commanded the defendant to assist him, by which the defendant put his hands upon him, which is the same battery; and after he went with the constable to D. in aid of him, and there delivered him to the gaoler, which is the same imprisonment, &c. and a good plea; for it is as well the imprisonment of the defendant as of the constable, and is not double, viz. the power which every man has to arrest a felon, and the command of the constable; but it is not good unless

Br. Double, pl. 103. cites S. C.

less the defendant *shows suspicion* in the plaintiff, as to say that he was a man of ill fame, or a vagrant doing no work; by which he pleaded so. Br. Trespas, pl. 335. cites 17 E. 4. 5.

[492] 7. False imprisonment against an abbot, and commoign; the abbot said that *W. S* came to him such a day and year, and said that he was in doubt of his life by *R.* who intended to kill and destroy him, and prayed his advice and counsel, who counselled him to go to *T. N.* justice of peace for a warrant of the peace, by which he obtained a warrant, whereby the plaintiff was arrested to the peace; and the officer said that if he would not find surety, that he would carry him before the justice of the peace. And the opinion of the whole Court was, that the plea amounts only to not guilty; for the defendant justifies no imprisonment, and his counsel was lawful. But per Rede, if he had said that he came in aid of the officer, &c. this had been a good plea; quod non negatur. Br. Faux Imprisonment, pl. 17. cites 12 H. 7. 14.

8. In false imprisonment, it is no plea that *diverse oxen were stole*, and because he suspected the plaintiff that he had stole 6 oxen, he arrested him; for he ought to say precisely that the oxen were stole; for otherwise he cannot arrest him. Per Fitzh. quod nemo negavit. Br. Faux Imprisonment, pl. 1. cites 27 H. 8. 23.

9. In false imprisonment, where the defendant justifies for several causes, and some of them are found good, and others not, the defendant shall not be amerced for this falsity; for there was good cause for the arrest, and this is only a defence, and not by way of action, as an avowry is. Jenk. 184. pl. 77.

Fol. 560. (F. a) Imprisonment. Justification. For what Causes it may be.

Br. False Imprisonment, pl. 13. cites S. C.—
Br. De son tort, &c. pl. 46. cites S. C.

[1.] IF a tenant by knight-service has 2 sons, and the eldest is taken by the Scots, and carried out of the realm in the life of the father, and after the father dies, the lord may justify the taking the younger brother as his ward, till the eldest comes back into England, and he has consueance of it, 22 Aff. 85. admitted. It seems it is intended, that he had not consueance in his absence whether he was alive or dead.]

2. A man cannot justify the imprisonment of a villein by command of the lord, unless for rebellion or disobedience. Br. Faux Imprisonment, pl. 40. cites 33 E. 3. and Fitzh. tit. Trespas, 253.

(F. a. 2) Trespas justifiable by Officers. [By Warrant.]

Cra. C. 394. pl. 6. S. C. accordingly, and the Court said,

[1.] IF there be the parish of *D.* and there is also a vill called *S.* which in truth is within the parish of *D.* but for a long time, that is to say, 60 years and more before the statute of 43 El. cap. of the poor, and all times after has been reputed a parish by itself. But the

the church-wardens of the parish of D. conceiving that by force of the statute of 43 El. they had power to *tax the inhabitants of S. to the poor of the parish of D.* taxed them accordingly; and thereupon, for default of payment thereof, have a warrant from the justices of peace, according to the statute, directed to the church-wardens to levy it. Whereupon the *church-wardens take a distress of the inhabitants of S.* who bring an action of trespass, and the church-wardens *justify by force of the warrant of the justices.* This is no good justification nor excuse of the trespass, though they do it by force of the warrant of the justices, and though (as was said) they cannot dispute the authority of the justices, inasmuch as the church-wardens nor justices have any power to charge them, and so they ought to take conscience of the law at their peril. * Hill. 10 Car. B. R. between NICHOLS AND WALKER adjudged, upon a special verdict found at bar. Tr. 10 Car. Rot. 222.]

that it is not like to an officer's making an arrest by warrant out of the king's court, which if it be error, the officer must not contradict, because the Court has a general jurisdiction. But here the justices of peace have but a particular jurisdiction to

make warrant to relieve rates well assessed. — Jo. 355. pl. 4. S. C. adjudged that trespass lay. — S. C. cited Arg. 4 Mod. 349. in the case of Crump v. Holford.

[2. If A. brings action against B. in an inferior court of record, in which C. is bail for B. and binds by recognizance his goods and lands, that B. shall render his body to prison if he be condemned, or that he shall pay the money recovered; and after judgment is given against B. and a precept is directed thereupon to the bail of the court in nature of a *capias ad satisfaciendum*, to take B. if he be found, and in his default to take C. And thereupon the bail returns, that because B. was not found, he took C. in execution; though by this recognizance C. does not bind his person, so that the *capias* does not lie against him; and though a *capias* does not lie at the same time against the principal and bail by a custom, (as was alleged) but a *capias* ought to be first against the principal, and after a *scire facias* against the bail; and though it was apparent in the precept to be against law, so that the bailiff might have taken notice of it, yet because the Court had jurisdiction of the cause, and he did it by force of the precept of the Court, it shall excuse him. Hill. 10 Car. B. R. between SEABORNE AND SAVAKER, adjudged. Per Curiam upon demurrer. Intratur, Tr. 10 Car. Rot. 572.]

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S. C. cited by Sir John Powell in his argument in the case of GWINNE v. POOLE, 2 Lutw. in the Appendix, 1563.

3. In bill of trespass it is not denied by the plaintiff, but that the sheriff, by *capias* awarded upon indictment of trespass, may break the house, or the doors of his close, to serve the arrest. Br. Trespass, pl. 248. cites 27 Aff. 37. but see thereof 18 E. 4. 4.

The sheriff cannot break a house nor close, to make execution by

scire facias; per Cur. But he may take the goods or body for execution. Br. Trespass, pl. 390. cites 18 E. 4. 4.

4. What an officer does by colour of justice or office, is excusable. See Kelw. 66. b. pl. 8. 20 H. 7. Anon.

5. When a court has jurisdiction of the cause, and proceeds *inverso ordine*, or erroneously, no action lies against the party that sues, or against the minister of the court that executes the precept or process of the court. Resolved. 10 Rep. 76. Mich. 10 Jac. in case of the Marshalsea.

As in trespass the defendant justified taking of beasts in execution, because he

was bailiff of the manor of D. and J. S. recovered damages upon plaint against the plaintiff in the court.

baron;

baron; and the defendant, by precept to him directed, made execution. The plaintiff said, that J. B. sent against him plea of franktenement there by plaint, where none shall answer of franktenement there, unless by writ, by which he demurred upon it; and yet the Court awarded damages against him for not defending, and the defendant took the beasts for the damages, where the judgment was *coram non judice*, and demanded judgment, and prayed damages, and by award he took nothing by his bill; for the officer shall not be grieved as here, for the judgment is not void; but shall have error or false judgment; but shall not have *affise*; because the land lies within the jurisdiction of the Court, though they ought to have held the plea by writ. Br. Trespas, pl. 238. cites 22 Aff. 64.

So if the sheriff arrests a peer on a *capias in debet* out of C. B. he is excusable, because the Court has jurisdiction of the cause. 10 Rep. 76. b. in case of the Marshalsea.

Trespas against an officer, who justified by a process out of an inferior court; but because the custom was not pursued, judgment was against him. Hale Ch. J. took this difference: if an officer, for his excuse, justifies by process according to custom, out of an inferior court, though the custom be bad, the officer shall be excused, and the judgment is not void, but voidable; but if the custom be not pursued, the officer shall not be excused; as if a custom be alleged in a court after a plaint levied to take out process, and he alleges that process was taken out, (but alleges no plaint levied,) he is a trespassor. Freem. Rep. 356. pl. 449. Mich. 1673. Bennet v. Therne.

*[494] 6. But when the court has not jurisdiction, all the proceeding is *coram non judice*, an action lies against them, without regard to precept or process. Resolved. 10 Rep. 76. in CASE OF THE MARSHALSEA.—2 * Bulst. 64. Weaver v. Clifford, S. P. Per Fleming Ch. J. and Doderidge J.

As where action is brought in a court of a contract, which was made out of the jurisdiction, or of land which lies out of the jurisdiction, and the plaintiff or demandant recovers, has execution, there trespass lies; for it was *coram non judice*. Contrary here, and so a diversity where the court may have jurisdiction of the thing by some means, and where it cannot have jurisdiction by any means. Br. Trespas, pl. 238. cites 22 Aff. 64.

But where a private act of parliament erected a court of conscience in B. for all matters under 40 s. and enacted, that all judgments for such matters elsewhere should be merely void; yet a judgment had in the town-court for a matter under 40 s. where this matter was not pleaded, is a justification of the officers for taking the defendant in execution. Carth. 274. Pasch. 5 W. & M. B. R. Prigg v. Adams.—2 Salk. 674. S. C. accordingly.—Skin. 350. 366. 407. S. C.

So if a justice of peace does not observe in his warrant all the circumstances prescribed by a statute, yet if the constable executes the warrant he is excused, as the statute of Car. 2. appoints, that all send their horses and carts to work in the highways, (not having a reasonable excuse to the contrary.) If a complaint be made to a justice of peace, that such a man did not send his horses, &c. and he makes a warrant; but mentions nothing in the warrant of his having sent for the party to know his excuse, yet the officer shall not be questioned for executing it. Vent. 273. Trin. 27 Car. 2. B. R. Webb v. Batchelor.—Freem. Rep. 396. pl. 514. S. C. and the Court inclined, that the officer was not liable, by reason of any irregularity in the justice's proceedings, if it be a matter whereof he has jurisdiction.—Ibid. 407. pl. 533. S. C. and judgment per tot. Cur. for the defendant.—S. C. cited by Sir John Powell in his argument in the case of GWYNNE v. POOLE, 2 Latw. 2563. and says, that Lord Hale there said, that otherwise it would be making the constable more knowing than the justice.

7. If justice of peace makes a warrant to arrest one for felony, who is not indicted, though the justice errs in the warrant of it, yet false imprisonment lies not against him who executes it. 10 Rep. 76. b. in case of the Marshalsea, cites 14 H. 8. 16. 2.

8. No action of trespass will lie against officers for taking goods or cattle by a replevin, unless he who has the possession claims property when the officers come to demand them, and they take them, notwithstanding such claim of property; and this special matter must come in by way of replication by the plaintiff; per Holt Ch. J. Carth. 381. Trin. 8 W. 3. B. R. in case of Hallet v. Byrt.

9. And so there is a difference between a replevin and other process, in respect to officers; for in replevin they are expressly commanded what to take in specie. But in writs of execution the words are general, viz. to levy of the goods of the party; and therefore it is at their peril if they take another man's goods; for in

in that case an action of trespass lies; per Holt Ch. J. Carth. 381. in case of Hallet v. Byrt.

10. In trespass and *false imprisonment* for such a time, *quousque* the plaintiff paid 11s. The defendant justified under the statute 3 Jac. 1. cap. 15. for erecting a court of conscience in London; and that on such a day the Court did order, that he should be carried to the Counter, and imprisoned until he paid 7s. debt, and 2s. 6d. for costs, by virtue whereof the defendant, being an officer, took him and detained him 6 hours. And upon demurrer it was held, per Cur. that though the defendant did not answer the detaining, *quousque* the plaintiff paid 11s. yet the plea is well enough; for the imprisonment, and not the *quousque*, is the cause of action; but the *quousque* is only matter of aggravation. And if he had said nothing to the money, the justification had been good; and if, after payment of the 9s. 6d. he had been detained, he ought to have replied it. But they held the plea ill, because the order was, to carry the plaintiff to the Counter; and though he confesses he detained him 6 hours, he does not shew it was in the Counter, or in carrying him thither. And this differs from the case of a common arrest; for in such case the officer may make any place his prison, because the writ is *ita quod habeas corpus ejus coram, &c.* apud Westm', which is a general authority; but here it is a special authority to carry him * to the Counter. 1 Salk. 408. pl. 3. Mich. 8 W. 3. B. R. Swinsted v. Liddall.

ment was given for the plaintiff.——Skin. 664. pl. 2. S. C. and Holt Ch. J. said if the plaintiff would take advantage, he ought to shew that he paid the 9s. 6d. and that the plaintiff detained him afterwards; otherwise the *quousque* is only in aggravation, and ought not to be answered; and though it should be a variance, yet the conclusion, *quæ est eadem transgressio*, aids it.—3 Salk. 219. pl. 6. S. C. by the name of SWINSTEAD v. SMITH, adjudged. And Holt said, if the detainer had been after payment of the 9s. 6d. it had been material; but then the plaintiff should have set it forth in a replication.

5 Mod. 295. S. C. and per Cur. this is a special authority given by act of parliament to this court of conscience, to commit, &c. but the officer is not to detain the person in custody till the money is paid to him; for neither he or the sheriff should receive it, unless it is upon a *fi fa*. And afterwards in Hilary term, for this reason, judgment was given for the plaintiff.

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11. If there be no judgment, and a *ca' sa'* or other execution is taken out, the sheriff and all other persons acting under him in the execution are justifiable, though there be no judgment. But if a stranger of his own head *interposes*, who is not concerned, and he sets on the sheriff to do execution, he cannot justify this. Or suppose it be the plaintiff who sued out the writ, he must in his justification plead the judgment; for if there be no judgment he is a trespassor; per Holt Ch. J. in delivering the opinion of the Court. 12 Mod. 178. Hill. 9 W. 3. B. R. in the case of Britton v. Cole, cites Ray. 73. Turner v. Felgate.

12. Where a judgment is illegally entered, and afterwards execution is sued out thereupon, and executed, the officers who execute it are excused, but the plaintiff is liable; for the officers are in no fault; they do but obey the process of the court. 2 L. P. R. 260. tit. Office and Officer.

13. In trespass for taking goods, the defendant pleaded a *plaint in replevin* in the sheriff's court in London, and that he was serjeant at mace, and a precept came to him to replevy those goods, which he did accordingly. The plaintiff demurred. And per tot. Cur. the plea is ill for want of shewing a return; for wherever a principal officer is to justify under a returnable process, he must shew that

12 Mod. 396. Pasch. 12 W. 3. S. C. And says, that in all *capias*'s ad respondendum, or the

other mean
process to
sheriff, if
trespass or
false im-
prisonment
be brought
against him
for execut-
ing them, he

cannot justify without shewing a return. — 3 Salk. 220. pl. 8. S. C. says, that because the pluries replevin commands the sheriff to replevy the goods, vel clausum nobis significes, therefore he must return the writ, otherwise this inconvenience might happen, (viz.) that if the defendant should appear, and be nonsuit (for he is the first actor) the Court would be at a loss how to give judgment whether pro returno habendo, or a capias in withernam, or a mere nonsuit. — Ld. Raym. Rep. 632. S. C. adjudged accordingly.

the writ was returned as he is commanded to do, and shall not be protected by it, unless he shews he paid a full obedience in acting under it; but any subordinate officer, as a bailiff, may. In this case the defendant is a principal officer; and this process, under which he justifies, was a returnable process; and judgment was entered for the plaintiff. Salk. 409, 410. pl. 5. Hill. 12 Will. 3. B. R. Freeman v. Blewit.

14. An arrest of a *criminal without a warrant* cannot be made good by a *warrant subsequent*. 2 Hawk. Pl. C. cap. 13. pl. 9.

Fol. 561.

(F. a. 3) Trespass justifiable by those *who are aiding Officers*.

Cro. C. 446.
pl. 11. Gir-
ling's case.
S. C. ad-
judged for
the defend-
ant, not-
withstanding
it was ob-
jected that
the sheriff
did not return the writ. — Jo. 378. pl. 8. S. C. adjudged.

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See pl. 1.
above.

[1.] If a *latitat* comes to a sheriff to take J. S. and the sheriff makes his warrant to certain bailiffs to arrest him, and *the bailiffs arrest him*, and after the arrest *J. D. upon the intreaty of the bailiffs keep the prisoner* in his custody till he is delivered by the sheriff; this is good matter of justification for J. D. in an action of false imprisonment brought against him by J. S. Hill. 11 Car. * B. R. between GIRLING AND ALLEN. Per Curiam adjudged upon a demurrer. Intratur, Tr. 11 Car. Rot. 539.]

[2. If a *stranger after an arrest* of a prisoner by bailiffs, upon a *process* of latitat, or capias, comes in aid of the bailiffs, and assists them to keep the prisoner in their custody, and this upon the *command of the bailiffs*, it is justifiable by the stranger in an action of false imprisonment. Hill. 11 Car. B. R. in the said case of GIRLING AND ALLEN. Per Curiam.]

3. Trespass of battery by J. the *defendant said that J. wounded B. to death and one W. a constable of the ward came to attack him, and he stood in defence, and he came in aid of the constable, and the ill which he had, was de son tort demesne, &c.* Judgment, &c. The plaintiff said that *de son tort demesne, &c.* Br. Trespass, pl. 110. cites 38 E. 3. 9.

4. Trespass against 2 of a horse taken, *the one said that he is bailiff, and attached it by plaint entered by R. against the plaintiff, and the other said that he came in aid of the bailiff.* Br. Trespass, pl. 402. cites 41 E. 3. 29.

5. Assault and battery by husband and wife against the defend-
ant, a constable, and 2 others, who *pleaded to all but the assault not
guilty, and as to that, the defendant justified that the wife was pre-
sented in the leet to be a common scold; whereupon the steward made a
warrant to the constable to punish her according to law, and the*
defendants

defendants went to the plaintiff's house to execute the warrant, and the wife assaulted the constable; wherefore he commanded the other defendants to lay hands upon her; and take her, which they did molliter. It was holden by the justices to be a good justification, although they neither shew the day when the leet was holden, nor that the plaintiff's house was within the jurisdiction of the leet, nor the steward's warrant; for that these were all but inducements to the bar and justification, and the substance is the presentment and the command of the constable. Mo. 847. pl. 1147. Hill. 13 Jac. B. R. Curteys's case.

6. Trespass for entering into plaintiff's house, and taking his goods; defendant justifies by virtue of a replevin out of the sheriff's court in London, and a precept thereupon to J. S. an officer, and defendant came in aid of him. Plaintiff replies, that before the taking away the goods he claimed property in them, and gave notice thereof to the defendant. And the question, upon a special verdict, was, whether the taking away after claim of property, and notice thereof, did not make him a trespassor ab initio? And held per tot. Cur. that he was a trespassor ab initio; for though the claim ought to be to the sheriff or officer, and that a claim to a person that comes in assistance, be not enough to the making the execution illegal, if the officer does not desist, yet if it be notified to him that comes in aid, that claim of property is made, he at his peril ought to desist. 6 Mod. 139, 140. Pasch. 3 Ann. in B. R. Leonard v. Stacy.

7. It is a good plea for a stranger, that he entered into a house in aid of a bailiff who had a writ of execution, and took the goods, and he need not say that he did it by command or desire of the bailiff; for every one not only may, but is by law, bound to assist officers in execution of justice. 10 Mod. 24. Trin. 10 Ann. B. R. Templeman v. Case.

(F. a. 4) Justification by Officers. Pleadings. [497]

1. **TRESPASS.** J. N. rid upon the horse of his master to C. and there one affirmed a plaint against the said J. N. and attached the same horse, by which the master of the servant brought trespass against the bailiffs, who attached the horse and recovered by award; for the defendant said the arrest was by others and not by him, and did not traverse the tort done by him, and so the plaintiff recovered; for the officer is bound to know whose goods he attaches. Br. Trespass, pl. 99. cites 11 H. 4. 90.

2. The defendant justified to make execution upon the land as officer of the admiralty for the sum of 20 marks there adjudged to J. N. and the plaintiff said that *de son tort demesne* without such cause. Yelverton said this is no plea; for where a sheriff justifies by fieri facias to him directed, &c. it is no plea that *de son tort demesne* without such cause, quod Newton & tota Curia conceffit; but if the sheriff makes warrant to his servant, and he serves it, and justifies thereby, there *de son tort demesne* is a good plea against him;

him; quod nota, diversity being matter of record and matter in fact, and immediate officer and other officer, and therefore as here he was compelled to answer to the cause, per Cur. quod nota. Br. De son tort, &c. pl. 14. cites 19 H. 6. 7.

3. Trespass for beating and imprisoning his wife, &c. the defendant justified by warrant from the sheriff; the plaintiff replied *de injuria sua propria absque tali causa*. The plaintiff had a verdict, and it was moved for a repleader, because *de injuria sua propria* is not a plea to matter of record, but the plaintiff ought to have traversed the warrant; but adjudged good after a verdict. Raym. 50. Mich. 13 Car. 2. B. R. Collins v. Walker.

4. In trespass the defendant, as bailiff, justifies by warrant on recovery in assumpsit in court baron, not shewing the cause thereof to arise within the jurisdiction of the court; for which cause the plaintiff demurred, and per Cur. it is ill. 1 Keb. 840. pl. 26. Hill 16 & 17 Car. 2. B. R. Hoyland v. Bacon.

5. In trespass of battery, the defendant justifies by process to arrest one Wood, and the plaintiff would have rescued him, whereupon he did *molliter manus imponere*; the plaintiff replied *de injuria sua propria, absque hoc* that the defendant had taken him by virtue of such warrant as that by which the defendant justified; to which the defendant demurred. And per Curiam the justification is sufficient, and better by the admittance in the replication, than if the issue had been offered *de injuria sua propria* generally without such traverse; and judgment pro plaintiff, 2 Keb. 293. pl. 77. Mich. 19 Car. 2. B. R. Haywood v. Wood.

[498] 6. In trespass, the defendant justified by a judgment in ejectment, and an *habere facias possessionem*, and warrant thereon, by which he was commanded to put the plaintiff in ejectment in possession, by virtue whereof he entered into the house, &c. and took the goods and put them in the highway, and the plaintiff refusing to go out, he thereupon *molliter manus imposuit* to turn her out, and she *de injuria sua propria* assaulted him, by which he defended himself, *absque hoc* that he was guilty before the warrant or after return of the writ; the plaintiff replied *de injuria sua propria*, without any traverse, or without saying *absque tali causa*. Resolved upon demurrer that this replication was ill, because *de injuria sua propria* is no good issue in any case without the words *absque tali causa*; but in this case either the writ of possession or the warrant upon it ought to be traversed 2 Lutw. 1381. Pasch. 4 Jac. 2. Rodoway v. Lowder.

7. Trespass for entering her house and taking her goods; the defendant justified by virtue of a *fieri facias* against the goods of one Dunn, and a warrant thereon, by which he entered the house and took the goods aforesaid. And upon demurrer the plaintiff had judgment, because the plaintiff counted of the goods taken as of his own goods, and the defendant did not aver that the goods which he took were the goods of Dunn; and if he had made such an averment, yet he should have alleged that they came there by the tort of the plaintiff, or some other matter by which he might justify the entering the house of the plaintiff to take them. 2 Lutw. 1385. Trin. 4 Jac. 2. Gardner v. Peyton and Chapman.

8. Where

8. Where an action is brought against an *officer*, or his assistant, for executing of a *capias ad satisfaciendum*, *he need not set forth the judgment but only the writ and warrant*; because he is an officer of the court to execute the process of the court; and if the *process* be *erroneous*, or there is *no judgment to ground the process upon*, yet the officer shall not suffer, for he doth but his duty to obey the court, who will protect him. But if the action be brought against the *plaintiff* in the execution, he *must plead his judgment*. Hill. 5 W. & M. B. R. 2 L. P. R. 259. tit. Office and Officer.

9. *Trespass quare clausum fregit & averia cepit & asportavit*, the defendant came and justified, and *pleaded a by-law, &c.* and that he, *as bailiff*, took the beasts as a *distress* for breach of the by-law by the plaintiff; and upon prolix pleadings, which were drawn up on the precedent of TINTENER's case in 1 Cr. and March, the plaintiff demurred, and many exceptions were taken; but in the resolution of the Court, Holt Ch. J. said that the pleadings are ill, because that the defendant had *not shewn a precept to make the distress*; for he could not do it *ex officio* no more than a sheriff might execute a judgment of B. R. without a writ, and the command in this case is traversable; for this is the *difference* between a *justification in trespass*, and an *avowry in replevin*, that the justification there is *in the right*, and therefore not traversable. But in *trespass* it is only by way of excuse; also in *trespass* it is sufficient to say, *presentatum existit*, but in *avowry* he ought to *shew the thing was done*, as well as *presentatum existit*. Skin. 587. Mich. 7 W. 3. B. R. Lamb v. Mills.

10. *Trespass against the officers* will not lie for taking goods, &c. by virtue of a replevin, unless he that has possession *claims a property when the officers come to demand them*, and they take them notwithstanding such claim; and this special matter must come in by way of replication by the plaintiff; and so there is a difference between a replevin and other process of law, with respect to the officers; for in the first case, (*viz.*) in replevin, they are expressly commanded what to take in specie, but in writs of execution, the words are general, (*viz.* to levy of the goods of the party, and therefore it is at their peril if they take another man's goods, for in that case an action of trespass will lie. Per Holt Ch. J. Carth. 381. Trin. 8 W. 3. B. R. in case of Hallet v. Burt.

(G. a) *Trespass ab Initio*. What Act shall make a [499]
Man [Officer or other] *Trespasser ab Initio*.

[1.] IF a man enters into a house by authority of law, and abuses that authority, he is a trespasser ab initio for the first entry; for it shall be intended that his first entry was to this purpose. Co. 8. THE SIX CARPENTERS, 146. b. 11 H. 4. 75. b.]

The case was, that the six carpenters went to a tavern, and drank a quart of wine which they called for, but went out again and refused to pay for the wine. 8 Rep. 146. The non-payment did not make the carpenters trespassors; for that was a non-feasance, and no non-feasance shall ever make a man a trespasser ab initio; per Coke Ch. J. Roll. Rep. 130. — Non-feasance cannot make the party that has authority or licence by law to be trespasser ab initio. 8 Rep. 146. Mich. 8 Jac. The Carpenters case.

If a man distrain corn in sheaves, and threshes it, or comes to a tavern, and steals a hamper, in these cases they are trespassors ab initio, and the very entry is punishable, which at first by the licence in law was good. Otherwise it is of a licence in fact, as Yelv. J. says; for this excuses the entry though tortious act ensues, and the party shall be punished only for this in which the act is tortious, and for nothing more. Yelv. 96. Hill. 4 Jac. B. R. Bagshaw v. Gaward.

If the law gives a man a liberty to a certain intent, and he uses this liberty to another intent, or misuses it, he shall be a trespassor from the beginning, if not that it be in special cases. Perk. f. 190.

The difference is between a licence in fact, and a licence in law. Perk. f. 191.

† Br. Trespass, pl. 97. [2. As if lessor enters into the house to see if waste be done, and there stays all night, he is a trespassor ab initio. † 11 H. 4. cites S. C. 75. b.]

Replication, pl. 12. cites S. C. — Fitch. tit. Trespass, pl. 176. cites S. C. — S. P. Br. Licence, pl. 17. cites 21 E. 4. 75. — So if he enters to see waste, and breaks the hedge. Yelv. 96. Bagshaw v. Gaward.

8 Rep. 146. [3. If the purveyor of the king takes my beasts, as for the household of the king, and after sells them in a market, he is a trespassor ab initio. 18 H. 6. 9. b.]
b. cites 18 H. 6. 19. b. [but is misprinted, and should be as in Roll. 18 H. 6. 9. b.]

Lane, 90. [4. If a searcher searches certain stuffs, and unpacks them, and S. C. — lays them in the dirt, by which they are impaired though the search was lawful, yet this abuser of this authority in law will make him a trespassor ab initio. M. 8 Ja. in the Exchequer. GIBSON's case, per Cariam.]
S. C. Infra, pl. 17.

† Br. Trespass, pl. 97. [5. If a man comes to a tavern, and will be there all the night, the cit. S. C. — taverner is not bound to watch with him, nor wait upon him all the night; and therefore if he prays him to go out, and he will not, Or if when he hath drunk, he carries away the cup without the will of the taverner, now he shall be punished for his first entry; for it cannot be intended that his entry was unto any other intent but to steal the cup; for the law cannot judge his intent against his act done, ex post facto. Perk. f. 191. — S. P. Br. Trespass, pl. 362. cites 22 E. 4. 5.]
H. 4. 75. b.]

away the cup without the will of the taverner, now he shall be punished for his first entry; for it cannot be intended that his entry was unto any other intent but to steal the cup; for the law cannot judge his intent against his act done, ex post facto. Perk. f. 191. — S. P. Br. Trespass, pl. 362. cites 22 E. 4. 5.

So if he breaks open a hamper, or strikes a servant of the house. Br. Replication, pl. 12. cites S. C.

[6. If a constable takes my goods in his vill, being waived by a felon who robbed me of them, and keeps them to the use of the owner; so that his first act was lawful, though he refuses to deliver them to me on demand, he is not a trespassor ab initio. Tr. 4 Ja. B. R. between WALGRAVE AND SKEGNES.]

So if I tender sufficient amends before the distress, the distress is tortious. 8 Rep. 147. in the 6 CARPENTERS case, and says that with this agrees 7 E. 3. 2. in the Master of ST. MARK's case; and that so is the opinion of Hull in 13 H. 4. 17. b. is to be understood, which opinion is not well abridged in tit. Trespass, 180.
* [500]

† Br. Trespass, pl. 97. [7. If a man takes my sheep damage feasant, and I tender him sufficient amends before the impounding, and he refuses it, and drives the beasts to the pound after, he is a trespassor ab initio. 13 H. 4. 17. b.]

† Br. Trespass, pl. 97. [8. So if he, who has distrained, detains the beasts after amends tendered before the impounding, he is a trespassor ab initio. 45 E. 3. 9. b. Contra, Co. 8. SIX CARPENTER. 147.]

before the distress the tenant upon the land tenders the arrears, a distress taken for it is tortious. 8 Rep. 147.

But if after the distress, and before impounding, it makes the detainer, and not the taking tortious; if after impounding, it makes neither the one nor the other tortious. 8 Rep. 147.

[9. If

[9. If a *serjeant of London* arrests *J. S.* at the suit of *J. D.* upon a plaint entered in the Counter, upon which arrest *J. S.* tenders bail to the *serjeant*, and prays him to go to the court of the Counter to accept the bail, and the *serjeant* refuses it, yet action of false imprisonment *vi & armis* does not lie, but he is put to his action upon the case; for this does not make him a trespassor ab initio, the caption being by *lawful process*. Tr. 6 Car. between *SALMON † AND PERCIVAL. Adjudged B. R. Mich. 14 Car. B. R. between FEVERELL AND BRIDGER. Adjudged per Curiam in arrest of judgment, in case of a bailiff of another county. Intratur, Tr. 24 Car. Rot. where the issue was upon the refusal; and the court held that it was † not the office of the bailiff to take bail, but of the sheriff or under-sheriff.]

the sheriff upon mesne process refuses bail, this does not make him a trespassor ab initio, though he is liable to an action upon the case; and cited the case of Salmon v. Percival.—So if the sheriff detains a man taken upon mesne process after a *superfedeas*; per Ventris J. 2 Vent. 96. cites Cro. E. 404. Stringer v. Stanlack, and Cro. J. 379. Withers v. Henley.

† S. P. Agreed by all. Cro. C. 196. in the case of Salmon v. Percival.

* Jo. 226.
pl. 2. S. C.
adjudged ac-
cordingly.—
Cro. C. 196.
pl. 7. S. C.

† Fol. 562.

adjudged ac-
cordingly.—
2 Vent. 96.
in case of
BEALY v.
SAMPSON,
Ventris J.
said that if

[10. [So] if a *capias* for the good behaviour be directed to the sheriff by the justices of assize, and thereupon the sheriff makes a warrant to *J. S.* to take him, who takes him accordingly, and the party tenders to *J. S.* sufficient bail for his appearance, and *J. S.* refuses it, and keeps him in prison after, yet this does not make him a trespassor ab initio; for it was † not the office of the bailiff to take bail, but the sheriff himself ought to do it. P. 10 Car. B. R. between ADAMS AND BAILIE, per Curiam, this being moved in arrest of judgment. Intratur, H. 9 Car. Rot. 109.]

[11. If the lord of a manor that ought to have all estrays there, takes an estray, and within the year works it, he shall be a trespassor ab initio, because it is not lawful, and he comes to the custody of him by the law. H. 4 Ja. B. R. between BAGSHAW AND GALLARD, adjudged upon demurrer.]

Yelv. 96. S. C. — Noy, 119. S. C. resolved accordingly.

[12. If the lord of a fair has used to have toll upon every sale, and for non-payment of the toll the lord seizes one of the beasts so sold, and works it, this makes him a trespassor ab initio. Mich. 13 Ja. B. Per Hubard.]

he is a trespassor; and if he distrains cows, and after milks them, or a horse, and after rides upon it, he is a trespassor. Br. Trespas, pl. 392. cites 22 E. 4. 47. — Br. Licence, pl. 17. cites 22 E. 4. 47.

Abuser of distress lawfully taken makes it a trespass ab initio. 1 Salk. 281. pl. 1. Hill. 2 W. & M. C. B. Gargrave v. Smith. — S. P. by Ventris J. 2 Vent. 96. in case of Bealy v. Sampson.

[13. If the custom of a vill be, that the bailiffs of the vill shall have 2d. for every hide of every sheep, cow, or ox which is killed within the said vill, and for non-payment of it to seize the hides, &c. and after the bailiffs do take certain hides for non-payment, &c. and tan them, and convert them into leather; by this they are trespassors ab initio; for though they do it for necessity, because otherwise the hides would putrify, yet this will not excuse them, inasmuch as the damage by the putrifying will be only to the owner, and

[501]
Cro. B. 783.
pl. 21. S. C.
adjudged for
the plaintiff
accordingly;
for by the
tanning the
property is
qualit altered,
and the

marks to
know them
by are taken
away from
the owner,

and not to them; for they may have action of debt for the
2d. M. 42, 43 El. B. R. between DUNCON AND REEVE ad-
judged.]
so as he cannot have them again. But, per Popham, in some cases one may meddle with and use a
distress, where it is for the owner's benefit; as where one distrains armour he may have it scoured, to
avoid rust; so if one distrains raw cloth he may have it fulled, because it is for the owner's benefit; but
this tanning is a means of taking away the thing itself.

Cro. C. 446.
pl. 17.
GIRLING'S
CASE, S. C.
adjudged ac-
cordingly.—
Jo. 378. pl.
8. S. C. ad-
judged ac-
cordingly.

[14. If upon a *latitat* a warrant be made by the sheriff to cer-
tain *special bailiffs*, to take the body of the party mentioned in the
writ, and they by force thereof take him, and J. S. a stranger
comes in their aid, and by their command, and after the sheriff does
not make any return of the writ, yet no action lies against J. S. who
comes in aid of the bailiffs, because his act was lawful, and the
default of the sheriff in not returning the writ shall not put him
to prejudice, and make him a trespassor ab initio. Hill. 11 Car.
B. R. between GIRLING AND ALLEN adjudged upon demurrer,
that no *false imprisonment* lies against J. S. who came in aid, for
the cause aforesaid. Intratur Tr. 11 Car. Rot. 539.]

[15. But [and] if a sheriff takes J. S. upon a *latitat*, or other
capias in process at my suit, and by my shewing, and does not re-
turn the writ, a false imprisonment does not lie against me, be-
cause I have not done any wrong. nor is it my default in not re-
turning the writ, nor was I the servant of the sheriff in delivery
of the writ, and shewing of the party to the sheriff. Contra
8 E. 4. 17. b. by Moyle.]

Cro. E. 181.
pl. 16. S. C.
adjudged ac-
cordingly.—
Mo. 352.
pl. 473.
Mosse v.
PACKE,
S. C. but
S. P. does
not appear.
—Le. 144.
pl. 20. S. C.
adjudged accordingly.

16. If a sheriff, upon a *fieri facias* to him directed against J. S.
makes a warrant to J. S. [R. S.] to execute the writ, and he does it
accordingly, and after the sheriff makes a false return, (scilicet, that
the writ came *tarde* to him, &c.) by which he himself is trespassor
ab initio, yet this false return shall not make the bailiff the tres-
passor, inasmuch as it was legally done by him; and by this exe-
cution by the bailiff the party, against whom it was executed, is
discharged. M. 31, 32 El. B. R. between PARKS, plaintiff, and
Mosse AND How, defendants. Per Curiam. But adjudged H.
32 El.]

Fol. 563.
Though by
the abusing
an authority
or licence in
seizure, a man
shall not be
trespassor

[17. If J. S. be a searcher of stuffs, and certain strangers come to
the others as servants to the said J. S. to search and unpack the stuffs,
and put it into the dirt, by which it is much impaired, though the
strangers did it without the precedent appointment or agreement
of J. S. yet if J. S. after approves the seizure, without any assent to
the abuser, yet he shall be a trespassor ab initio. M. 8 Ja. in the
Exchequer. GIBSON'S CASE. Per Curiam.]

ab initio, but an action on the case lieth; yet for misusing an authority in law, trespass lieth ab initio.
Lane, 90. Gibson's case. — S. C. supra, pl. 4.

[18. If a *capias* be directed out of an inferior court to the officer
of the court, to take J. S. and he takes him accordingly, and does
not return the process, he is a trespassor ab initio, because it is his
[502] own default, inasmuch as he himself is the officer who ought to
return

return it, and is as sheriff within this jurisdiction. Mich. 15 Car. B. R. between KIRKE AND ATKINS. Per Curiam adjudged upon demurrer, upon an imprisonment in the honour of Peverell. Intratur, Tr. 14 Car. Rot. 51.]

[19.] [8. If a *capias in process* issues against J. S. and the sheriff takes him, and after returns *non est inventus*, he is trespassor ab initio, and false imprisonment lies against him. 8 E. 4. 18. 11 H. 4. 58.]

[20.] [9. So if the sheriff does not make any return upon the said writ, false imprisonment lies against him; for he is trespassor ab initio; for the writ is *ita quod habeas corpus ejus* at the day of the return *hic in curia*. 16 H. 7. 14. 3 H. 7. 3. b. 8 E. 4. 17. b. 9 E. 4. 3. 21 H. 6. 5. 18 E. 4. 9. b. Co. 5. HOE, 90. 2 H. 6. 26]

The diversity is between *capias in process*, and *capias ad satisfaciendum*;

for if the *capias in process* be not returned, the arrest is tortious; because there the intent of the arrest is, that the party shall appear and answer the plaintiff. But in all other writs of execution, which are made by the sheriff alone, if the execution be duly made, it is good, though the writ be not returned; unless in case of *elegit*, where the extent is made by an inquest, and not by the sheriff alone, it is otherwise. 5 Rep. 90. Trin. 42 Eliz. in the Exchequer, HOE's case. — And Ibid. 90. b. in a note of the reporter, it is said, that where the words of the writ of *fi. fa.* are *ita quod habeas denarios*, &c. those are only words of commandment to the sheriff to make return; the which if he does not do he shall be amerced, but yet the execution shall stand in force. — Lane, 52. Trin. 7 Jac. in the Exchequer, in the case of *Doillie v. Joiliff*. S. C. cited, and same diversity taken.

[21.] [10. Upon a *capias in process*, if the sheriff makes his warrant to the bailiff of a franchise to execute it, who does it accordingly, and makes return of the body and warrant accordingly to the sheriff, and the sheriff after does not return the writ, yet this shall not make the bailiff a trespassor ab initio, because he has done his duty, and no default in him, and he is the officer of the franchise, and not of the sheriff. 8 E. 4. 17. b. * 21 H. 7. 23.]

* Kelw. 86. b.

[22.] [11. [So] if a *capias in process* be awarded to the sheriff, and he makes his warrant to a bailiff errant, who is sworn, and a known bany within the same county, to take him, and he does it accordingly; if the sheriff after does not return the writ, this makes him a trespassor ab initio, because he is but the sheriff's servant, and therefore ought to be subject to the tort done to the party, as his master is. 20 H. 7. 13. † 21 H. 7. 22. M. 14 Car. B. R. between HOW AND STOCKENHAM adjudged. Intratur, P. 14 Car. Rot. 412. upon demurrer.]

The bailiff is but the sheriff's servant, and has no means to make the sheriff to return the writ, and the arrest made by the bailiff was legal, and

shall not be made illegal by the sheriff's act in not returning the writ. See Cro. C. 447. GIRLING's case. — Jo. 378. S. C. — Per Powell J. upon a *mesne process* the bailiff who acts by a warrant from the sheriff is not liable in trespass, if the sheriff does not return the writ. 2 Vent. 95.

† Kelw. 86. b.

[23.] [12. But in the said case, if the bailiff errant returns the body and warrant to the sheriff, though the sheriff does not return the writ, yet he is excused. 20 H. 7. 13. b. by Read, and 21 H. 7. 22.]

[24.] [13. [So] if the sheriff upon such process makes special bailiffs, and they take the party, and the sheriff does not return the writ, though there be not any default of the bailiffs, yet they are trespassors ab initio, because they are but servants to the sheriff, and by his appointment. Contra H. 11 Car. between GIRLING AND ALLEN. Per Curiam.]

Cro. C. 446. pl. 11. GIRLING's CASE, S. C. adjudged, that the bailiffs are not trespassors

ab initio. — Jo. 378. S. C. adjudged accordingly. — See pl. [22]. 11, Marg.

[25.] [14.

[25.] [14. If a man makes his executors and dies, and after the executors find, amongst other goods of their testator, an obligation, by which their testator was bound to J. D. and they thinking that the obligation was discharged, because the day of payment was past, break the seal, they are trespassors ab initio, though they come lawfully to it, scilicet, by trover. Hill. 11 Ja. B. between HIGGINBOTTOM AND STODDARD adjudged.]

26. If a man may justify the taking at one time, it cannot be tortious after without special matter, as *misdemeanor after*, as it seems. Br. Trespals, pl. 311. cites 7 E. 4. 3.

27. The defendant justified by prescription for 10 load of wood every year to burn, and 10 load to repair pales between Michaelmas and Christmas, *absque hoc* that he is guilty before Michaelmas, and after Christmas; and the other said that he cut the day in the declaration, *absque hoc* that the defendant and his ancestors, &c. and traversed the prescription, and if he expends it on other purposes than in burning or repairing pales, trespass lies; *quod nota the misdemeanor after makes trespass to lie*. Br. Trespals, pl. 318. cites 10 E. 4. 2.

* S. P. Br. Licence, pl. 17. cites 21 E. 4. 75.

28. If the lord comes upon the tenancy, and takes and chases away a beast, and impounds it, the taking shall be deemed as for a *distress*; but if he * kills the beast, this subsequent act is a declaration of his intention ab initio, and will make him a trespassor. 9 Rep. 11. a. per Cur. in DOWMAN's case, says with this accords 12 E. 4. 8. b. 28 H. 6. 5.

29. If there be lord, mesne, tenant, and the lord *distraints the beasts of the tenant* for rents, &c. paid by mesne, if the lord will not suffer the mesne to take the beasts of the tenant out of the pound, he is a trespassor ab initio. 9 Rep. 22. b. in B. R. in the case of avowry, cites 13 E. 4. 6. a. b.

So if such distress so taken, or taken for

a rent service, be misused. But, quære if a distress be taken for a rent-charge, and be misused. Perk. f. 191.

30. If one takes a *distress damage-feasant*, and drives it into another county, and there sells it, this makes him a trespassor ab initio. And. 65. pl. 139. Mich. 23 & 24 Eliz. Pleadall v. Knap.

31. *Detainer* in his house of one who comes there voluntarily is a *caption*; per Coke Ch. J. and Croke J. Roll. Rep. 241. Mich. 13 Jac. B. R. in case of Withers v. Henley.

32. If the sheriff has not any writ, and makes a warrant to J. D. to arrest J. S. an action lies for J. S. against J. D. for this arrest, and against the sheriff likewise; per Jones J. Jo. 379. pl. 9. Hill. 9 Car. B. R. in Girling's case.

33. Action of battery against a constable, who had made a search in the plaintiff's house for stolen goods, by virtue of a justice of peace his warrant, to search in all suspicious places; and upon the evidence it appeared the defendant in this search did pull the cleatbe from off a woman's bed, then in her bed, to search under her smock; and this was holden to be a misdemeanor in the constable, and all with him, and did make all their proceedings in this place illegal from the beginning. Summer Assises, 1636. Coram Barkley J. Clayt. 44. pl. 76. Ward's case.

34. If

34. If one imprisoned be *detained by the gaoler for not paying unreasonable fees*, it seems that this does not make it a false imprisonment *ab initio*. Skin. 50. Trin. 34 Car. 2. B. R. in case of Elliot v. Beley.

35. In battery and imprisonment the defendant justified by attachment out of Chancery, that the sheriff after delivery of the writ to him made his warrant to him 27 May, by which he took the plaintiff the same day, and traversed all time before the warrant or after the return of the writ. The plaintiff maintained his declaration, and traversed that the writ was delivered to the sheriff before the battery and imprisonment. The defendant rejoined that before return of the writ he was delivered to the sheriff, viz. on the said 27 May, and that before the arrest he had no notice [504] of its not being delivered to the sheriff. The plaintiff sur-rejoined, that *before the arrest the writ was not delivered to the sheriff*. The defendant rebutted as before, that *he had no notice, &c. at de hoc ponit se, &c.* Upon demurrer, judgment was given for the defendant; for 1, It is not material whether the writ be delivered to the sheriff before the warrant and arrest or not, so long as *in rei veritate* there is a writ which warrants the whole. 2. There being a writ and a warrant thereupon, the bailiff shall not be charged for the executing it; for he was neither privy nor had notice of the time of its delivery to the sheriff, and he has tendered an issue of notice, which the plaintiff has refused to accept. 3 Lev. 93. Mich. 34 Car. 2. C. B. Osborne v. Brookhouse.

36. A *fieri facias* was awarded against T. *tested 27 April*, and afterwards, viz. the 28th of April, *he became a bankrupt*, and the 29th of April the sheriff took the goods by virtue of the *fieri facias*; afterwards an extent issued out of the Exchequer, whereby the goods are taken out of the sheriff's hands; after which the commissioners of bankruptcy make an assignment to the creditors, and the assignee brings trespass against the officers, who took the goods by virtue of the extent. The Court were of opinion, that a construction should not be made to make the officer a trespassor by relation; for the taking was lawful at the time, and BAILY AND BUNNING's case in Siderfin was agreed per Holt and Dolben; judgment for the defendant nisi. Comb. 123. Trin. 1 W. & M. in B. R. Leechmere v. Thorowgood.

3 Mod. 236.
Trin. 4 Jac.
2. S. C. but
S. P. does
not appear.
—2 Vent.
169. Pasch.
2 W. & M.
In C. B. the
S. C. and
mentions the
judgment in
B. R. but
the S. P.
does not
otherwise
appear there.
—Show.

12. Pasch. 1 W. & M. in B. R. the S. C. And the Court was clear that trespass lay not against the officers, though trover would against the party. And judgment for the defendant.

37. Where it is apparent to the officer, that the *cause of action arose out of the jurisdiction*, he is a trespassor by executing it: otherwise where it is not apparent. 1 Salk. 202. pl. 5. B. R. Lucking v. Denning.

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(H. 2) Trespas. Justification by Officers. Process. Execution. What Things done in Execution of Process may be justified.

1. IF the sheriff arrest J. S. upon a latitat, and he escapes, the sheriff cannot enter into the house of J. D. and there break a chest of J. N. after demand of the keys, to seek his prisoner there, upon information that he was fled into the said house: but he ought to take it upon him that he was in the chest; for otherwise the sheriff upon such pretences may search the houses of all men within the county. P. 1 Car. between BENNET AND GRAY adjudged, the declaration being that he was informed that he was in the said house, &c. This is entered Mich. 22 Ja. B. R. Rot. 155.]

2. Trespas of goods taken, &c. the defendant justified as officer, because A. recovered against W. N. 10l. at B. in a fair in the court of piepowders, and he did the execution, and sold the goods, and delivered the money in execution, and admitted for a good plea. Br. Trespas, pl. 244. cites 22 Aff. 90.

† S. P. Br. Trespas, pl. 403. cites S. C. For it is actus curie. — Br. Execution, pl. 26. cites S. C. — Br. Gage Deliverance, pl. 3. cites S. C.

3. If recovery in assise is had in ancient demesne of land and damages after a fine thereof levied at common law, so that the land is made frank-free, yet the † officer who served the execution for the damages recovered in the assise, shall not be blamed; nor the lord who held the plea, though the recovery be coram non iudice; for they are not bound to take conuance of the fine; quod nota. Br. Office & Off. pl. 6. cites 7 H. 4. 27.

* [505] Br. Execution, pl. 26. cites S. C. accordingly, contra to the opinion of 4 H. 6. 17.

4. In replevin of taking beasts, it is a good justification that A. recovered certain land and damages in ancient demesne, and that he is bailiff, and by precept directed to him he made execution, viz. he sold the beasts and delivered the money to the plaintiff in execution. And a good justification; for a justification is to excuse the defendant of tort only, and not to have return of the beasts; but avowry or conuance is to have return quod nota diversitatem. And so see that it is admitted that bailiff in ancient demesne may sell the beasts to levy a sum to make execution; contra it was said in other court baron, which is not ancient demesne. Br. Justification, pl. 13. cites 7 H. 4. 27.

5. In trespas the defendant justified by shewing the land to the sheriff to make there the view to the demandant in a writ of formedon brought by this defendant against this now plaintiff; and the plaintiff said that de son tort demesne absque tali causa, and the defendant said that such cause, prist, &c. Br. De son tort, &c. pl. 26. cites 10 H. 6. 8. and Fitzh. tit Issue, 60. Brooke adds nota, that it was of a house; and he said that he found the doors open and entered and made the view.

Br. Justification, pl. 1. cites S. C.

6. If in precipe quod reddat the court awards a cape by which the sheriff arrests the tenant; he shall not have false imprisonment though

though they amend the process after into grand cape ; for the act of the court shall not prejudice the party who ought to be obedient to the commands of the Court. Br. Conspiracy, pl. 1. cites 20 H. 6. 5.

7. Trespas quare clausum fregit, &c. the defendant justified because the plaintiff was amerced in the court baron of J. S. &c. and he by command of the Court entered, finding the house and the close open, and took for distress. And a good plea, without saying how the close was inclosed or open. Br. Trespas, pl. 439. cites 16 H. 7. 14.

For land which lies open without inclosure, is inclosed against every one who has

no interest there ; and his writ shall say clausum fregit, and the precept in the court baron is good by parol. Br. Trespas, pl. 439. cites 16 H. 7. 14.

8. Trespas for breaking his house ; the defendant justifies his entry *virtute warranti* of the sheriff upon a *fieri facias* to levy such a debt *de bonis & catallis quæ fuerunt Philippi Biscop testatoris ; tempore mortis in manibus Lucretie Biscop his executrix ;* and says, that the executrix was in the plaintiff's house *cum bonis suis*, and for that the door stood open, he entered to levy that debt, &c. And it was thereupon demurred and adjudged to be an ill bar ; because he does not allege that bona testatoris were in the house, but bona propria executricis, which were not liable to execution ; but if bona testatoris had been there, it was conceived that the entry had been justifiable. Wherefore it was adjudged for the plaintiff. Cro. E. 759. pl. 30. Pasch. 42 Eliz. in C. B. Bishop v. White.

9. By the common law no house can be broken by the king's officer at the suit of a common person (but otherwise at the suit of the king.) But by the statute of 21 Jac. of bankrupts, commissioners may break the house of the other for debt of the debtor ; and if bankrupts convey their goods to a neighbour's house, the commissioners cannot, but the sheriff may, break the house, because he is a sworn officer of the king. The commissioners may break the booth or ship of the other to come at the bankrupt's goods. Per Mr. Barchdale Lecturer of Lincoln's-inn in Lent 1627. D. 36. b. Marg. pl. 41.

10. Sheriff on a *fieri facias* may break the door of a barn, without request, to take goods in execution, unless the barn is adjoining and parcel of the house. Sid. 186. pl. 11. Pasch. 16 Car. 2. B. R. Penton v. Brown.

11. If there be a disseisor of a manor, and a recovery in that court baron, the officer may well justify executing the process ; for he that is in possession is dominus pro tempore. Freem. Rep. 404. pl. 207. Mich. 1675. Ward v. Bent.

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(H. a. 2) Trespas justifiable. [Entry into Land or House.]

[1.] If a man seised of land in fee has certain loads of timber upon the land and dies, his executor may justify the entry into the land to take the timber. 9 H. 6. 11.]

[2. So if the executor sells it to another, the vender may justify the entry into the land to take the timber. 9 H. 6. 11.]

[3. If a man has a piscary in another's soil, he may justify the putting the pales in the soil, or doing other thing. 20 H. 6. 4.]

2 Roll. Rep. 55. S.C. accordingly.— S. C. cited and adjudged accordingly. 2 Lutw. 1311. Baldwin v. Neaks.— So if A. take my horse, and carry him to the land of B. it is not lawful for me to enter into the land and take him. But if A. feloniously steals my horse, and carries him into B.'s land, then I may justify my entry into the land, and retake him.. 2 Roll. Rep. 55. Higgins v. Andrews.— If A. will carry my horse into his stable, I may justify my entry into his stable to retake him. But in the case above, the trees were carried away by a stranger. Per Doderidge J. S.C. 2 Roll. Rep. 56. cites 21 H. 6. 30.— If A. takes wrongfully the goods of another, and carries them into A.'s own land, the owner may take them thence: but not out of the land of a stranger. But in no case a man can enter within my door to take his goods. Per Chamberlain J. 2 Roll. R. 208. in case of Masters v. Poolie.— Because every man's house is his castle, into which another cannot enter without special licence. Godb. 283. pl. 403. Mich. 18 Jac. B. R. in Pollys's case.

[4. If certain persons unknown, in a felonious manner, come into my garden, and eradicate and pull up certain apple and pear trees, and carry them away into the house of J. S. and the common voice being that the said trees are in the house of J. S. yet I cannot justify my entry into the said house to take the said trees, inasmuch as the stealing those trees being annexed to the franktenement, was not felony, but only a trespass; and so the case is no other; but that if the trees had been taken by a trespassor and put into the said house, then it had not been lawful for me to take them without being a trespassor by my entry. Mich. 16 Ja. B. R. between HIGGINS AND ANDREWS, adjudged upon a demurrer.]

[5. But otherwise it had been, if the stealing of the thing had been felony, and I had upon fresh suit taken it in his house, this had been justifiable in a trespass against me. Mich. 16 Ja. B. R. in the said case of HIGGINS AND ANDREWS, per Curiam agreed.]

6. Trespass by a chaplain of a chamber broken, and gold rings taken and carried into London; the defendant said, that in London is a custom used, time out of mind, that when a chaplain has a feme in his chamber, of whom a man has an ill suspicion, that man shall come to the constable of the ward, or to the beadle, and enter the chamber and search; and that he was related to such a feme, and delivered the same rings to the feme, who brought them to the chamber of the chaplain, and there the said chaplain detained the feme and the goods by a great time, by which he and the beadle entered the chamber and searched and found the goods, and carried them away, as lawfully he might, judgment, if action of the goods or breaking the chamber ought he to have; and because the plaintiff by possession of the goods for the time had property, therefore it was held a good plea to the goods, and to the breaking; quod nota, that this is colour in itself. Br. Trespass, pl. 74. cites 2 H. 4. 12.

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7. If a vicar has offerings at my house or chapel, he cannot by colour thereof break my house or chapel to take them out, &c. Br. Trespass, pl. 77. cites 2 H. 4. 24.

8. In trespass, the defendant said that the plaintiff distrained his beasts, and he sued a replevin, and came with the sheriff to shew him the beasts, which is the same trespass, &c. Judgment si actio, and the defendant imparled. Br. Trespass, pl. 11. cites 3 H. 6. 37.

* S. C. and P. cited 11 Rep. 52. a. in LIFORD'S case; quod suit concessit.

9. In trespass the defendant justified, because J. S. was seised, and devised it to the plaintiff for life, and that the defendant should sell the reversion, &c. and that he found the door open, and entered to see if there was any waste, and to see the value of the house to sell it, and

and a good plea; and it is there granted that such entry is lawful to see if waste be done, but he cannot break the door nor windows to enter. Per quod the plaintiff replied that he broke the door and windows, and the other e contra. Br. Trespass, pl. 186. cites 9 H. 6. 29.

sum per tot. Car. So if a man is bound to repair a bridge, he may come upon the

land of any one that adjoins to the bridge to repair the bridge, and this without licence of them. Br. Trespass, pl. 240. cites 43 Aff. 37. per Knyvet Ch. J.

10. In trespass for breaking his close and hunting, defendant pleaded not guilty to the hunting; and to the breaking he said that a variance was between him and the plaintiff for a gorce, and he saw him hunting in his park, and entered by the gate, which was open, to shew him his evidence to the gorce, which is the same breaking, &c. and a good justification by all the justices; quod nota. Br. Trespass, pl. 23. cites 20 H. 6. 37.

Br. Justification, pl. 3. cites S. C.

11. If trees are blown down by the wind, it is no trespass to enter the land into which they are blown down to take them. Lat. 13. Per Crew Ch. J. in case of Millen v. Hawery, cites 6 E. 4. 7.

But if a man cuts trees in his own land, which fall into another

man's land, and goes and he takes them, trespass lies; per Crew Ch. J. Lat. 13. cites 6 E. 4. 7.

12. If a man takes my goods, and puts them upon his land, I may enter and retake them. Contrary upon *bailment of goods; per Littleton. Br. Trespass, pl. 186. cites 9 E. 4. 35.

S. P. Per Littleton; for in the one case it is tort, and

in the other not. Br. Nuisance, pl. 14. cites S. C.

* When a man bails goods to another to keep, it is not lawful for him, though the doors are open, to enter into the house of the bailee, and to take the goods, but ought to demand them; and if they are denied, to bring writ of detinue, and to obtain them by law. Br. Trespass, pl. 208. cites 21 H. 7. 13.

13. A man may break a house to take a felon, or for suspicion of felony. Contra of debt or trespass. Br. Trespass, pl. 330. cites 13 E. 4. 8.

14. If 2 are fighting in a house, I may justify entry into the house to part them, because it is for the preservation of the peace, which is a thing that concerns the commonwealth; per Yaxley, quod Frowike Ch. J. concessit. Keilw. 46. b. pl. 2. Mich. 18 H. 7. Anon.

15. If beasts are damage feasant in the lands of another, a stranger cannot justify entering into the land to turn them out, upon a pretence that it is to the advantage of the owner of the land; for it prevents the owner from taking the benefit of distraining them for satisfaction of the damage; per Frowick Ch. J. Kelw. 46. b. Mich. 18 H. 7.

16. In trespass of breaking a close, per Rede, it is not lawful to say that the defendant had timber lying there, and came to see his timber. Br. Trespass, pl. 208. cites 21 H. 7. 13.

17. If my beasts are in another's land damage feasant, I cannot justify to enter to recatch them; per Rede Ch. J. Br. Trespass, pl. 213. cites 21 H. 7. 27.

But if another chases my beasts into the land of J. N. I

may enter and recatch them; for the tort commenced in another person; per Rede Ch. J. pl. 213. cites 21 H. 7. 27.

Br. Trespass,

18. In

3 Le. 266.
Pl. 358. S.C.
but adjorna-
tor.

18. In trespass for *entering his house, and taking his goods*, the defendant pleads that the goods were B.'s, who sold them to the defendant, and that he came to the house, and demanded them, and the plaintiff being absent, his wife licenced him to enter and take them; whereupon he entered and took them. And upon demurrer it was adjudged ill, it not appearing how the goods came, viz. either as trespass, &c. and therefore cannot enter of his own head, and the licence by the wife was not sufficient; but Gawdy contra, for it may be intended the goods were there by the plaintiff's licence, and then he might well enter and take them. Cro. E. 245. pl. 3. Mich. 33 & 34 Eliz. C. B. Taylor v. Fisher.

All. 35. S.C.
adjudged
that his fear
is no justifi-
cation, and
the defend-
ant has re-
medy against
those that
compelled.

19. In trespass *quare clausum fregit, and taking of a gelding*, the defendant pleaded that he, for fear of his life, and wounding of 12 armed men, who threatened to kill him if he did not the fact, went into the house of the plaintiff, and took the gelding. The plaintiff demurred to this plea. Roll J. this is no plea to justify the defendant; for I may not do a trespass to one for fear of threatenings of another; for by this means the party injured shall have no satisfaction, for he cannot have it of the party that threatened; therefore let the plaintiff have his judgment. Sty. 72. Mich. 23 Car. Gilbert v. Stone.

20. If *tenant at will sows the land, and then determines his own will*, he cannot break the hedges to carry away the corn. Vent. 222. Trin. 24 Car. 2. B. R. in case of Perrot v. Bridges.

21. If the sheriff upon a *fieri facias sells corn growing*, the vendee cannot justify an entry upon the land to reap it, until such time as the corn is ripe; per Twisden. Vent. 222. in case of Perrot v. Bridges.

(H. a. 3) Retaking Goods, &c. Justifiable in what Cases.

1. **TRESPASS.** If a man *seizes an ox, &c. to the use of the king*, he who has property cannot re-take it. And so it seems that the king may be intitled to a chattel by seizure, or otherwise, without office, as appears by this case. See the book. Br. Trespass, pl. 375. cites H. 39 E. 3:

2. If a man takes my swan's eggs, which after produce cygnets, the first owner may take the one and the other; per Fairfax. Br. Trespass, pl. 323. cites 12 E. 4. 4, 5.

So where
a man took
the sow of
another
which pro-

3. So if a man takes my mare or cow, which after produces a foal or calf, the first owner may take them; per Fairfax. Br. Trespass, pl. 323. cites 12 E. 4. 4, 5.

duced pigs, the owner brought replevin of both, and recovered damages for both; per Littleton. Br. Trespass, pl. 323. cites 18 E. 3. 48.

It is agreed
to among
civilians,

4. Where a thing may be known, the owner may retake it, though another thing be mixed with it. Br. Property, pl. 23. cites 5 H. 7. 15. that in all cases where the new form may be reduced to the former state, the property remains to him who hath the old substance; but otherwise not. Arg. Raym. 329. in case of BAMBARDGE v. BATES, and says, that with this agrees 16 H. 7. 16. pl. 6. Mo. 19. pl. 67.

S. As

5. *As in trespass of shoes and boots taken, the defendant said, that he was possessed of 3 dickers of leather, and bailed them to W. S. who gave * to the plaintiff, who made thereof shoes and boots, and the defendant retook them; and the re-taking good and lawful, for the nature remains.* Br. Property, pl. 23. cites 5 H. 7. 15. S. P. Arg. Raym. 329. in case of Cambridge v. Bates. * [509]

6. *So where a man takes cloth, and makes thereof a robe, the owner may retake it; for the nature is not changed.* Br. Property, pl. 23. cites 5 H. 7. 15. But wool made into cloth cannot be retaken. Arg. Raym. 329. in case of Cambridge v. Bates.

7. *So of iron made into a bar.* Br. Property, pl. 23. cites 5 H. 7. 15. But iron made into an anvil cannot be retaken. Arg. 2 Brownl. 114. in case of Cross v. Westwood.

8. *But, per Cur. where grain is taken, and made into malt, or † money taken and made into a cup, or ‡ a cup made into money, these cannot be taken; for grain cannot be known one from another, nor one piece of money from another.* Br. Property, pl. 23. cites 5 H. 7. 15. † If a man takes a white piece, and causes it to be gilt, the owner cannot retake it, by some. Br. Property, pl. 23. cites 5 H. 7. 15.

‡ Plate altered in fashion may be retaken, but not if converted into coin. Arg. 2 Brownl. 114. in case of Cross v. Westwood.

9. *And if a man takes timber, and makes thereof a house, this cannot be retaken; for the nature is altered into franktenement.* Br. Property, pl. 23. cites 5 H. 7. 15. But if a man takes my tree, and squares it into timber, yet

the owner may retake it; for it may be known. Br. Property, pl. 23. cites 5 H. 7. 15. — S. C. cited Arg. 2 Brownl. 117, 118.

In trespass, &c. the defendant justified under a lease, and that afterwards A. entered, and cut down trees there growing, and made them into timber, and brought it on the land where the trespass was supposed, and gave it to the plaintiff; whereupon he (the defendant) entered on the said land, and retake his timber. Upon a demurrer to this plea it was objected, that by making them into timber the defendant could not know it to be his tree, and so the property altered; but adjudged, where any thing is wrongfully taken, and altered in the form, yet if that which remains is the principal part of the substance, then the notice is not lost, and therefore if he saws them into boards he may retake them; but if they are fixed upon the land, or a house be made of the timber, it is otherwise. Quære, the house now is the principal substance. Mo. 19. pl. 67. Mich. 2 Eliz. Anon.

10. *If a man takes fish, he who has the water may retake them;* per Keble. Kelw. 30. a. pl. 2. Mich. 13 H. 7.

11. *Trespas for breaking his close, et quædam averia ibidem existent' cepit & asportavit.* Defendant pleaded, that the cattle were his own goods, and that J. S. took the cattle by wrong, and put them into the plaintiff's close by the plaintiff's assent; and the defendant finding them there, took them, &c. The Court held the plea good; for the plaintiff does not aver the property of the beasts to be in him, but says only quædam averia. And when the beasts are taken from him by wrong, and are not out of his possession by his own delivery, he may justify the taking of them in any place where he finds them. Cro. E. 329. pl. 3. Trin. 36 Eliz. B. R. Chapman v. Thimblethorp.

12. *A. lends a horse for hire to ride to D. and within the time the horse is lent for, A. meets the rider at a place further distant than* Cro. J. 236 pl. 8. S. adjud

cordingly.
—Brownl.
217. S. C.
adjudged ;
but seems to
be taken
from Yelv.
172.

than D. yet A. within the time cannot seize his horse ; for the person that hired him has a good special property for the time he hired him for, against all the world. And if he misuses the horse in riding to any other place, that is to be punished by action on the case, and not by seizing the horse. Yelv. 172. Hill. 7 Jac. B. R. Lee v. Atkinson and Brook.

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13. A. found the goods of B. and bailed them over to C. for money ; in that case the owner may take them again ; per Doderidge J. Arg. 3 Bulst. 17. in case of WALLER v. HANGER, cites 22 E. 4.

14. Milk made into cheese cannot be retaken ; res corruptæ & transformatæ abesse videntur ; a thing arising from the parts is not any of the parts. Arg. Raym. 329. in case of Bambridge v. Bates.

15. A master of a ship may keep the goods till he be paid his freight ; but if he once parts with the possession of them, he cannot retake them ; per Holt Ch. J. 12 Mod. 511. Pasch. 13 W. 3. B. R. Anon.

16. If A. makes a bill of sale to B. a creditor, and afterwards to C. another creditor, and delivers possession at the time of the sale to neither ; and after C. gets possession of them, and B. takes them out of his possession. C. cannot maintain trespass, because the first bill of sale is fraudulent against creditors, and so is the second ; yet they both bind A. and B.'s is the elder title, and the naked possession of C. ought not to prevail against the title of B. that is prior, where both are equally creditors, and possession at the time of the bill of sale is delivered over to neither ; per Holt Ch. J. 2 New Abr. 606. Baker v. Loyd, cites Trin. 1706.

(H. a. 4) *Plea good.* In Trespass for taking or re-taking Goods.

1. **I**N trespass of goods and chattels, the plaintiff shall not count of monies taken ; for he ought to have had a special writ. Br. Count, pl. 90. cites 34 E. 3. 23.

2. Trespass of corn carried away. The defendant said that he was seized, and leased to W. N. for life, who died, and the defendant entered and sowed the land, and we came, and cut and carried away, and awarded a good plea ; and therefore it seems that this is colour in itself. Br. Trespass, pl. 114. cites 38 E. 3. 28.

3. Trespass of trees cut and taken ; per Finch. you yourself gave them to us, and a good plea. Br. Trespass, pl. 394. cites 42 E. 3. 23.

4. If I recover damages, and the sheriff delivers to me your goods in execution, you cannot have trespass against me ; for I am no transgressor ; per Finchd. & tot. Cur. Br. Trespass, pl. 48. cites 44 E. 3. 20.

5. Trespass of taking of goods ; the defendant said that they were cast into the sea by tempest, and the defendant took and kept them, and when he came to land he bailed them to the servant of the plaintiff to his use, absque hoc that he took other goods, or in other manner, and admitted

mitted for a good plea; therefore quære of the vi & armis. Br. Trespass, pl. 54. cites 46 E. 3. 15.

6. Trespass of goods taken in *Middlesex*, a taking by gift in *London* is no plea, *without traversing the taking in Middlesex*; quod nota. Br. Trespass, pl. 89. cites 11 H. 4. 3, 4.

Trespass of goods taken at D. in the county of S. the defend-

ant justified by gift of the plaintiff at London, by which he took them in the county of S. and a good plea; the plaintiff said that at the time of the gift he was within age, and a good replication. Contrary if the infant had delivered the goods to the defendant; for this is a good excuse in action of trespass, but the gift is void. Br. Trespass, pl. 150. cites 22 H. 6. 3.

7. Trespass of a mare, the defendant justified as distress for rent of A. of whom the land is held, and the defendant at the desire of the plaintiff intreated A. so that the distress was re-delivered to the plaintiff, upon condition that if the plaintiff did not pay the rent by such a day, that he should re-take the distress, &c. and he did not pay, &c. by which he re-took it and re-delivered it to the plaintiff, and admitted for a good plea without argument. Br. Trespass, pl. 410. cites 10 H. 6. 3. [511]

8. Trespass of goods taken. The defendant said, that the plaintiff at D. in the county of C. sold it to J. N. by which he took it, as lawfully he might, as servant to J. N. the vendee, and by his command, and admitted for a good plea. Nota. Br. Trespass, pl. 124. cites 19 H. 6. 8.

So elsewhere of a gift. Br. Trespass, pl. 124.— See pl. 6

9. In trespass the defendant said that the property of the goods was in J. N. who made the defendant his executor, and died, and we took as executors, and gave colour to the plaintiff as executor, where he is not executor, &c. which is the same taking, and a good plea. Br. Trespass, pl. 126. cites 19 H. 6. 12.

10. In trespass of goods taken in C. it is a good plea, that the plaintiff bailed them to him at D. to bail them over, which he has done, absque hoc that he is guilty of the carrying away at C. and a good plea; per tot. Cur. and yet C. and D. were in one and the same county. Br. Trespass, pl. 386. cites 19 H. 6. 43.

11. Trespass of battery of his servant per quod servitium servientis sui prædicti, &c. The defendant said, that he was retained with him before he beat him, and departed and came to the plaintiff. And yet it seems that it is no plea; for he cannot retake him, nor beat him, without request to his second master. Br. Trespass, pl. 139. cites 21 H. 6. 8, 9.

Where a man has ward or servant retained who departs from him, he cannot take them, and

bring them back by force, nor put his hands upon them to bring them back; but he may require them, &c. and if they refuse, he shall have his action; per Cur. Br. Trespass, pl. 225. cites 38 H. 6. 25.

12. In trespass it is no plea, that A. was possessed as of his property, and bailed to the defendant, and the plaintiff took them, and the defendant retook; for there is no colour. Contrary where he says, that A. was possessed, and bailed to B. who gave to the plaintiff, and A. retook and gave it to the defendant. And per Newton, it is a good plea, that the defendant was seised till by the plaintiff dis-seised, upon which he re-entered and did the trespass. Br. Trespass, pl. 146. cites 21 H. 6. 36.

Br. Justifica-
tion, pl. 12.
cites S. C.

13. Trespafs by administrators of goods carried away. The defendant said, that the testator was possessed as of his proper goods, and made J. S. his executor, and died, and after the goods came to the hands of the plaintiff, and the defendant by command of the executor took the goods, and after the executor refused before the ordinary, who committed the administration to the plaintiff, judgment. And per Laicon, Prisot, and Moyle, this is a good plea, and the colour is good; for the defendant acknowledged possession in the plaintiff; and the power of the administrator, by the committing of the administration, shall have relation to the death of the intestate; and therefore this is matter in law, at least if the justification be now good or not. And when matter of law is, then there needs no colour; for it is matter in law (when the administration is so committed) if the administrator shall have trespafs of the taking before the committing of the administration or not. And by them the plea is good; for when the defendant had good cause to justify at the time, &c. this shall not be lost by the refusal of the executor, since he is a third person. Br. Trespafs, pl. 222. cites 36 H. 6. 7.

[512] 14. Trespafs of goods taken in T. The defendant said, that the place where, &c. is a house of which J. B. was seised in fee, and infeoffed him, and he found the goods damage feasant, &c. and ill pleading; for in trespafs of goods, &c. it is not the form to say, that the place where, &c. is such a house, or such land; for by intendment it is supposed that the place is a vill. Contrary it is in trespafs done of land. Br. Trespafs, pl. 293. cites 5 E. 4. 124.

15 Trespafs of a close broken, and goods carried away. The defendant, as to the close broken, prayed judgment of the writ; for the plaintiff has not any thing in it, unless in common, & pro indiviso with W. N. not named in the writ. And as to the goods, he demanded judgment of the writ; for before the plaintiff any thing bad, S. was possessed ut de propriis, and made the plaintiff and A. his feme his executors, and died; and A. took the goods, and was thereof possessed and made the defendant her executor, and died; and the defendant found the goods, amongst other goods, in the house of A. and took them to keep to the use of the plaintiff; and therefore the plaintiff ought to have detinue, judgment of the writ. And it seems there, that he ought not to take the goods of the first testator, another executor being alive; wherefore he said, that his testator put those goods, and others of his proper goods, together in one chest, and so he found them. This is a good justification, for he cannot sever them; but where the goods are severed, it is not lawful for him to take them which do not belong to him; quod Fairfax and Choke concesserunt. And a good plea, without saying that he is, and at all times has been, ready to deliver them; for if he may justify the taking at one time, it cannot be tortious after without special matter, as misdemeanor after, as it seems, Br. Trespafs, pl. 311. cites 7 E. 4. 3.

16. In trespafs of goods carried away, it is a good plea, that they were the goods of two alien enemies of the king, and the defendant seised them, as lawfully he might; for it was said there, that every man may seile the goods of enemies of the king brought into England,

England, and retain them to their own use. Per Vavisor, it was adjudged in the time of this king, that he who takes such goods shall retain them as above. Br. Trespass, pl. 313. cites 7 E. 4. 13.

17. Trespass of taking his hawk. The defendant justified for damage feasant in his pigeon-house; and it was admitted. And per the justices, trespass quare columbas cepit does not lie, for he has no property. Br. Trespass, pl. 387. cites 16 E. 4. 7.

18. Trespass of taking his horse. The defendant said, that the plaintiff lent it to him till he had finished his business; and said, that he had not yet finished his business. And a good plea, per Brian and Littleton, notwithstanding that the time is uncertain. Quod nota. But no mention of the uncertainty of the business. Br. Trespass, pl. 337. cites 17 E. 4. 8.

19. Trespass of taking beasts in A. in D. The defendant said, that he was seised of land called C. in D. aforesaid; and the same day found the beasts damage feasant in C. aforesaid, and took them, and chased them towards the pound, and they escaped, and went into A. aforesaid, and the defendant freshly retook them, which is the same taking of which the action is brought. Pigot protestanda, that the place of C. is not the franktenement of the defendant, and pro placito, that before the taking alleged by the defendant, the defendant took the beasts in A. aforesaid, and chased them to his land called C. aforesaid, and they escaped into A. and the defendant took them prout, &c. upon which first taking we have brought this action. Bridges changed his plea, and said, that the same day, before the trespass supposed by the plaintiff, he found the beasts damage feasant in C. his own soil, and took them, and they escaped into A. aforesaid, and he freshly pursued and took them in A. &c. Pigot said, he took them in A. absque hoc that he first took them in C. &c. Modo & forma, prout, &c. and so to issue. Br. Confess and Avoid, pl. 52. cites 21 E. 4. 64.

20. Trespass of trees and oaks cut. The defendant said, that the plaintiff leased to him 10 acres of land for term of years, of which the place, &c. by force of which he was thereof possessed, and cut the trees, &c. and a good plea; and yet the writ of waste lies. Br. Trespass, [513] pl. 430. cites 13 H. 7. 9.

21. And in trespass of goods taken, the defendant said, that the plaintiff leased to him a house in D. for a year, and the goods were his before the lease, and he put them into the house, and the plaintiff immediately after the year determined took the goods damage feasant, and the defendant retook them. And no plea, per Cur. for he ought to carry his goods out at the end of the term; and if he leaves them there, he cannot after justify to enter and retake them. Br. Trespass, pl. 430. cites 13 H. 7. 9.

22. Trespass of goods taken. The defendant said, that the plaintiff put them within the doors of the defendant; and after, because the plaintiff was indebted to the defendant in 10 l. it was agreed between them, that the defendant should retain them till he was paid, by which he took them, and the plaintiff has not yet paid. And a good plea, by the opinion of the Court, without shewing cause of the debt; and a good plea, without shewing other taking; for the putting
P p 3 into

into the house is no delivery; but when he accepted them by the agreement, this is the taking; for if he had pleaded delivery, it had been not guilty argumentatively. Br. Trespass, pl. 209. cites 21 H. 7. 13.

As in trespass of taking of his boat, the defendant pleaded

23. In trespass it is a good plea *that the plaintiff gave them to the defendant, by which he took them.* Br. Trespass, pl. 209. cites 21 H. 7. 13.

gift of the plaintiff of all his goods by deed, &c. at which time the boat belonged to the plaintiff, judgment, and a good plea; and so see gift in trespass a good plea; and the plaintiff was not received to say, that at the time of the trespass the boat was his boat without shewing how he came by it after, &c. by which he said that at the time of the gift it was the boat of one A. who gave it to him after, and the defendant carried it away; and the defendant said that at the time of the gift it was the boat of the plaintiff first, &c. Br. Trespass, pl. 42. cites 42 E. 3. 1, 2.

In trespass the defendant pleaded a gift, the plaintiff said that after the gift and before the trespass the defendant re-gave to him; and the defendant maintained his bar absque hoc that he re-gave after the first gift, and it was accepted; quære if it be pregnant. Br. Negativa, &c. pl. 55. cites 10 H. 6. 16, 17.

So in trespass of a boat taken, and the defendant pleaded a gift by J. N. and the plaintiff said that J. N. took it out of the possession of the plaintiff, and gave, &c. The defendant maintained the gift absque hoc that the plaintiff had any thing before the gift; and well, and not pregnant. Br. Negativa, &c. pl. 53. cites 38 H. 6. 25.

As in trespass of corn taken, the defendant said they were severed from the 9

24. Where things are not in such danger, but that the owner may remedy it; or have his remedy for this trespass by action against the other, there a man cannot justify the taking of the goods to save them. Per Kingsm. Justice. Br. Trespass, pl. 213. cites 21 H. 7. 27.

parts, and were in danger of being lost by beasts in the field, by which he took and put them into the barn of the plaintiff, pars n of the will; and by the opinion of the Court it is no plea; for they cannot be in such danger in the field, but that men may guard them. Br. Trespass, pl. 213. cites 21 H. 7. 27.

And it is not lawful for a man to take my horse, saying that it was in danger of being stole. Per Brudnell. Br. Trespass, pl. 213. cites 21 H. 7. 27.

Nor where my feme is out of her way, it is not lawful for a man to take her to his house, if she was not in danger of being lost in the night, or to be drowned with water. Per Brudnell. Br. Trespass, pl. 213. cites 21 H. 7. 27.

But where goods of another are in danger, by water, fire, &c. of which the party cannot have remedy, there I may take them to save them. Per Rede Ch. J. Br. Trespass, pl. 213. cites 41 H. 7. 27.

[514] (I. a) Trespass. Justification. Upon Default or Act of the Plaintiff himself.

[1. IF A. be seised in fee of copyhold land next adjoining to the land of B. and A. erects a new house upon his copyhold land, and some * part of the house is erected upon the confines of his land next adjoining to the land of B. if afterwards B. digs his land so near to the foundation of the house of A. but on no part of A.'s land, by which the foundation of the house and the house falls into the pit, yet no action lies by A. against B. because it was A.'s own fault that he built his house so near the land of B. for he by his act cannot hinder B. from making the best use he can of his own land. P. 15 Car. B. R. between WILDE AND MINSTERLEY, per Curiam after a verdict for the plaintiff. But it seems that a man who has land next adjoining to my land cannot dig his land so near my land, that thereby my land shall go into his pit; and therefore if the action had been brought for this it would lie.]

[2. In

[2. In trespass quare claudum fregit called S. in the parish of D. if defendant justifies *because his sheep were stolen by persons unknown, and that the plaintiff afterwards chased the said sheep with his own sheep in the same parish, and that he suspected that his sheep were chased into the said close of the plaintiff, in which, &c. and upon this he went into the said close where, &c. to search for his sheep, and not finding them there, he went out of the close as soon as he could, doing as little damage in going and returning as he could.* This is not a good justification, because he did not enter to search for the felon, which was for the commonwealth, but for his private interest to inquire for his goods; for by the same reason he may come into the lands of any other men, with a pretence to search for his goods. And here he does not shew any cause of suspicion that the sheep were in this close. Mich. 1649. between TOP-LADY AND SCALEY. Adjudged upon demurrer per totam Curiam præter Justice Jermyn, who was e contra. Intratur, Mich. 24 Car. Rot. 596.]

Sty. 165. S. C. says that Roll Ch. J. held as here, and Jerman thought judgment ought to be given for the defendant, and that Ask J. said the case was hard on both sides, but that the Court gave judgment for the plaintiff nisi, &c.

[3. If a man ought to repair a fence between my land and his land next adjoining, if he does not repair it, by which my beasts enter into his land for default of reparation, this is justifiable in a trespass brought by him. 19 H. 6. 34. 39 E. 3. 3. b.]

Br. Trespass, pl. 192. cites S. C. and that the other replied that his

hedge was sufficiently inclosed. [And so this point was admitted.]—S. P. Br. Trespass, pl. 148. cites 21 H. 6. 39.—And in such case J. may pursue and retake them. Per Frowicke. Kelw. 30. pl. 2. Mich. 13 H. 7. Anon.—See Infra, pl. 26.

[4. So in the said case it is lawful for me to go into his land to retake my beasts and reclose them into my own land. And this is justifiable in trespass, because it comes by his own act. 13 H. 7. Kelloway, 30.]

[5. If a man ought to impale against a forest, and by his default of impaling the savages go into his land, it is justifiable for the forester in trespass there to enter into his land, where the savages escape, to reclose them into the forest, because they come in by his own default. Dubitatur, 13 H. 7. Kelloway, 30.

Per Brian Ch. J. the forester cannot enter into any man's land out of the forest,

nor into the land which should have been inclosed against the forest, because the property of *savages* is only during their being in the forest (or park) and no pursuit will preserve it; and in this respect they differ from other beasts not savage. Kelw. 30. b.

* [515]

[6. If beasts are impounded in a place inclosed which has a gate open, if the sheriff comes to make replevin, and the owner of the close stands with bows and arrows in the gate to shoot at him, by which he is in *†* fear of death, he may, to avoid death, break the close and enter there, and make the replevin. And this trespass is justifiable. 20 H. 6. 28.]

The same law of sheriff & bailiff. Br. Justification, pl. 2. cites S. C. *†* See (H. 2. 2) pl. 19.

[7. If my land be open to the highway, and the beasts of a stranger enter upon the land, this is not justifiable. 39 E. 3. 3.]

[8. If a man does a nuisance in his own soil to my mill, house, or land, I may justify the entry into his soil, and sling down this nuisance, because it was of his own wrong. 9 E. 4. 35. Curia. 8 E. 4. 5. Co. 9. BATEN, 55.]

As if a man by a ditch diverts the water from my mill, I may fill up

the ditch with that which the other has dug out. Per Danby. Br. Trespass, pl. 186. cites 9 E. 4. 35.

† Fol. 556.
2 Le. 202.
pl. 254. cites S. C.

[9. If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take † my goods again; for they come there by his own act. 9 E. 4. 35.]

S. P. Br.
Trespas, pl.
186. cites 9
E. 4. 35. per
Littleton.

[10. If a man by negligence suffers his house to be on fire, I who am his neighbour, may break down his house to avoid the peril, which may come to me by the burning of it. 9 H. 4. 35. b.]

For the tort
commences
on his part.

[11. If a man tortiously imprisons me in his house, I may justify the breaking the windows and door to go out. 9 E. 4. 35. b.]

Br. Trespas, pl. 186. cites S. C. — Br. Nuisance, pl. 14. cites S. C. — Arg. 2 Le. 202. pl. 254. cites S. C.

See Distress,
(N). —
S. P. Co.
Litt. 161. a.
that if the
tenant, or

[12. If my tenant, seeing me coming to distrain, drives his beasts out of the land held of me into land held of another man, I may justify my entry there to take the distress, because it was by his own tort. † 9 E. 4. 35.]

any other, to prevent the lord to distrain, drive the cattle out of the fee of the lord into some place out of his fee, yet may the lord freshly follow and distrain the cattle, and the tenant cannot make rescous, albeit the place wherein the distress is taken, is out of his fee; for now in judgment of law the distress is taken within his fee, and so shall the writ of rescous suppose. But if the lord coming to distrain had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle of themselves, after the view, go out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distress, then cannot the lord distrain them out of his fee; and if he does, the tenant may make rescous. — 2 Inst. 131. S. P. — And although in such case the distress be taken out of his fee or seignior, yet it is within the statute of 21 H. 8. cap. 19. For in judgment of law the distress is lawful, and is as if taken within his fee and seignior. Co. Litt. 268. b. — S. P. for when they are in his view they shall be adjudged in his possession. Br. Trespas, pl. 296. cites 2 E. 4. 6. and says the reason seems to be, because they are transitory.

† Br. Trespas, pl. 186. cites S. C.

S. P. Arg.
by 3 Just.
against Coke.
Roll. R. 45.
— But per
Haughton J.

[13. If a man has an heap of grain by my heap of grain, and takes an handfull out of my heap, I may justify the taking an handfull again out of his heap, because he shall not take advantage of his own wrong. Tr. 12 Ja. B. R.]

not to take more than the other took from him. Ibid. — See title property (E) pl. 6, 7, & 8. and the notes there.

Cro. J. 366.
S. C. — 2
Bull. 323.
S. C. —
Roll. R. 133.
S. C. —
See Pro-

[14. If I have an heap of grain or money, and another comes and casts his grain or money into my heap, I may justify the carrying away all, because otherwise he will by his tort bar me to take my own goods. H. 12 Ja. B. R. in WARD AND AIRES's case, per Curiam.]

erty (E), pl. 6 & 7. and the notes there.

* [516]

This is the
5th resolu-
tion in
TERRING-
HAM's case.
4 Rep. 38.
b. Mich. 26
& 27 Eliz.
B. R. S. P.

[15. In trespass for chasing of his beasts, it is good justification that the beasts were in his close damage feasant, and he with a little dog chased them out of the land; for inasmuch as they come there of their wrong, the owner is not bound to impound them, but may remove the tort done to him, by chasing of them out of the land. Co. 4. TERRINGHAM, 38. b. resolved.]

and shall not be compelled to distrain for damage feasant. — Sav. 23. pl. 56. Pasch. 42 Eliz. Terringham's case, is not S. P. — See (N. a), pl. 12.

[16. If

[16. If 2 tenants in common of timber or other goods are, and the one takes it, and puts into his several land, the other cannot justify the entry into the land to retake it, because though he may retake, yet inasmuch as there is not any tort in law when one takes all to his own use, because the law has allowed him so to do for the trust which is between them, he cannot justify a trespass in the land to retake it; but he ought to take it when he can without trespass. M. 18 Ja. B. R. between MASTERS AND POLLEY. Per Curiam.]

2 Roll. Rep. 141. Hill. 17 Jac. B. R. S. C. but S. P. does not plainly appear. — Ibid. 207. S. C. and S. P. held by the justices

accordingly. — Godb. 282. pl. 403. POLLEY's case, S. C. and S. P. agreed by the Court.

[17. If a man comes into my close with an iron-bar and sledge, and there breaks my stones, and after departs, and leaves the sledge and bar in my close, in an action of trespass for taking and carrying of them away, I may justify the taking of them and putting of them in the close of the plaintiff himself next adjoining, especially giving notice of it to the plaintiff, as it was pleaded, inasmuch as they were brought into my close of his own tort; and in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself by them by tort of the plaintiff. P. 11 Car. B. R. between COLE AND MAUNDER adjudged upon a demurrer. Intratur, Hill. 10 Rot. 502.]

18. Trespass quod arbores succidit & asportavit; Fulth. said the plaintiff sold to the defendant Horsleywood, except 40 of the best ashes, and the plaintiff to carry them within 2 years next; and after he came and required the plaintiff to cut and carry them, and he would not; and because the defendant by his bargain had but 3 years to take the wood, he left 40 of the best ashes, and cut and carried the rest; per Caund. you abated our wood, absque hoc that we were warned, prout, &c. and said no more. Br. Trespass, pl. 299. cites 44 E. 3.

Br. Trespass, pl. 50. cites 44 E. 3. 39. S. C. says it was admitted for a good justification.

19. Trespass of trees [grafs] spoiled, and fed with the cattle of the defendant, who said that the plaintiff to the intent to have the defendant in his power, commanded his own servant to chase the beasts of the defendant into his land, which he did accordingly, and the defendant as soon as he knew of it, chased them out; judgment *si actio*, and a good plea, and was not compelled to say not guilty. Br. Trespass, pl. 148. cites 21 H. 6. 39.

20. Trespass of a close and house broken, and grafs spoiled, his servant beaten, and his oxen taken. Laycon said that he had a highway going to D. against the said house where, &c. and the defendant rode in the said way, and when he was against the house, the plaintiff and others came with bows and arrows, &c. and assaulted the defendant, and he left his horse, and fled into the house, and over into the close, and came back into the way, which is the same trespass, &c. and as to the grafs spoiled, pleaded the same matter, and when he came back into the way his horse was in the close, by which he freshly re-entered and retook his horse, & hoc, &c. and to the beating the servant he said as above, that they made an assault upon him, and the damage which they had was of their own assault, &c. Br. Trespass, pl. 204. cites 37 H. 6. 37.

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21. And as to the oxen he said, that before the trespass A. B. affirmed plaintiff of replevin before the sheriff of beasts taken, and he made precept

to the bailiff to make deliverance, by which the bailiff, and this defendant by his command, made the deliverance three days after the trespass supposed, and attached the plaintiff to answer, *absque hoc* that he is guilty before the third day. Choke said he ought to shew if the way be in the same vill as the house, or where else it is, and also he does not say whether the doors of the house were open when he entered, by which he said so. Br. Trespass, pl. 204. cites 37 H. 6. 37.

22. It was said for law, that if all the neighbours of the vill carry their grain out of the common field, except one who would not carry for frowardness or negligence, there the others may put their beasts in the field, and shall not be trespassors to the other. Br. Trespass, pl. 352. cites 21 E. 4. 41.

Brownl. 221. S. C. and is a translation of Yelv. but that some words are misprinted. —Roll. Rep. 11. pl. 12. S. C. but S. P. does not appear. —Cro. J. 337. pl. 1. S. C. but not S. P. —Bulst. 157. S. C. but that is of cattle straying out of a close into the highway, which was the waste of the lord, who thereupon brought trespass, but the Court discounted the action, which see at (N. a) pl. 11.

23. Trespass for chasing his cattle at S. the defendant justified for damage feasant in a close called *Wh. Acre*, which was his frank-tenement. The plaintiff replied that B. was seised in fee of a close called *Bl. Acre* in R. which he leased to him; and that the defendant was seised in fee of another close called *Gr. Acre*, which lay contiguous to *Wh. Acre*, and so prescribed for the defendant and all those whose estate he had in *Gr. Acre*, to repair the fences between those two closes; and that he put his cattle into *Bl. Acre*, and they for default of enclosure escaped into *Gr. Acre*, and thence into *Wh. Acre*. The defendant rejoined, and confessed that the plaintiff was possessed of *Bl. Acre*, and himself seised of *Gr. Acre*, as above; but said, that between *Bl. Acre* and *Gr. Acre* there is a little brook, which on the side of *Bl. Acre* has a bank contiguous to it, which B. and those whose estate, &c. have used, &c. to repair, and for want of repairs the beasts escaped out of *Bl. Acre* into *Gr. Acre*, and thence into *Wh. Acre*; whereupon the defendant chased them, &c. The plaintiff demurred and had judgment; for the defendant pleaded a good bar, and the plaintiff made a good replication, and showed the default to be the defendant's, by not inclosing between *Bl. Acre* and *Gr. Acre*, and the rejoinder does not confess and avoid the replication, but perplexes the matter, by adding a prescription on the plaintiff's part, to repair a bank between *Bl. Acre* and *Gr. Acre*, whereupon issue cannot be taken, because then 2 prescriptions shall be tried together, which cannot be. Besides the rejoinder is no answer to the replication but by way of argument, and if true, is good matter in evidence against the plaintiff, who must prove his replication true; for the plaintiff says that *Bl. Acre* and *Gr. Acre* are contiguous, which intends that there is no mean space between them, whereas the rejoinder says that there is a bank between them, and if so, they are not contiguous. But the defendant should have traversed the prescription alleged by the plaintiff, which would have made an end of all; per tot. Cur. Yelv. 217. Hill. 9 Jac. B. R. Durrant v. Child.

24. In trespass of treading his grass, entering his close called the yard, and pulling down his gate, &c. The defendant justified for a passage by and through his yard, and that at the time when, &c. a gate was erected in the passage, so that he could not pass with his beasts, whereupon he broke the gate, and in passing along he aliquantulum trod the grass, which is *idem residuum*. The plaintiff objected, that

that he could not justify pulling down and breaking the gate, he *not having shewn that it was locked or nailed*, so as he could not pass. But per Cur. he having pleaded that the gate was put there, so as he could not use his passage, it *shall be intended* locked or nailed, or that the way is thereby so straitened that he could not pass, and the plea good; and that the replication being so general, is idle [518] and vain. And per tot. Cur. judgment for the defendant. 3 Lev. 92. Mich. 34 Car. 2. C. B. Sprigg v. Neal.

25. In trespass of entering his close, and *killing two mastiffs*, the defendant pleads that they were *set upon his hogs and were like to kill them*, to prevent which he entered into the said close, and killed the mastiffs. And per Hale Ch. J. the justification of killing the mastiffs is well enough; for one cannot set mastiffs upon pigs to kill them, but he may hunt them with a little dog. Freem. Rep. 347. pl. 432. Mich. 1673. King v. Rose.

26. *A. was seised of Bl. Acre, B. of Gr. Acre, and C. of Wh. Acre, which 3 closes adjoined to one another. B. was to repair the mound between A. and B. and C. was to repair the mound between B. and C.—A. puts his beasts into Bl. Acre, which strayed into B.'s close for want of repairs between Bl. Acre and Gr. Acre, and out of Gr. Acre into Wh. Acre, the mounds being out of repair between B. and C.—C. brought trespass, and A. pleaded the special matter.* The question was, whether or no, when the beasts of A. stray into the close of B. for default of repairs by B. and so were no trespassors there, and then stray into the close of C. for default of repairs by C. this should excuse the trespass of A.'s beasts, as it would for the beasts of B.? The Court seemed to incline that it would not; for though C. was bound to repair between him and B. and so B.'s beasts would have been excused if they had strayed into his close, yet the prescription that binds him to repair, is only personal against B. and his beasts, and not against all beasts that come into his close. Twisden said, if this were a good plea, the right of repairing the fences between B. and C. would be tried between A. and C. but he thought A. must be put to his special action on the case against B. for not repairing, per quod, &c. Sed Cur. advisare vult. Freem. Rep. 379. pl. 495. Mich. 1674. Right v. Baynard. See pl. 3. supra.

(K. a) Trespass. Justification. What shall be good Justification. *A Thing of Necessity.*

[1.] **I**F a man has a way over my land for his beasts to pass, * if the beasts feed the grass by morsels in passing, it is justifiable. P. 15 Ja. B. R. REEVE AND DOWNS. Per Curiam, it being against his will, as it is to be intended.]

* Fol. 567.

If a man has way over the land of

another for his cattle, and upon the way he scares his cattle, so that they run out of the way upon the land of the owner, and the driver *freshly pursues* them, &c. if trespass be brought, he that had the way may plead this special matter in justification; per Richardson Ch. J. Het. 166. Hill. 6 Car. C. B. Anon.

[2. If

Roll. Rep.
79. S. C.
accordingly.
—And see
tit. Necessi-
ty (A),
pl. 12. S. C.

[2. If there are diverse passengers in a common passing barge upon the Thames, and one of them has a pack with him, in which are bound up monies and things of great value, and a tempest arising, all the goods in the barge are cast into the sea for safeguard of their lives, among which the pack aforesaid is cast into the sea, the master of the barge not having notice that there were any such things of value in it; in an action for the pack, and things therein, this is justifiable, because it was done for the preservation of their lives. M. 12 Car. B. R. by Coke said, that it was so resolved in bank in the case of GRAVESEND BARGE.]

[519] 3. If a chimney be on fire, I may enter and take the goods in safety, which are in jeopardy to be lost; per Palmes. Br. Trespass, pl. 213. cites 21 H. 7. 27.

[K. a. 2] Things of Charity.

[1.] [3.] N trespass of his house broken, if defendant pleads, *that her daughter was retained in the service of the plaintiff, and was very sick in the said house, being then the plaintiff's servant, and defendant being her mother, entered into the said house to see her daughter, which is the same trespass; this is not a good justification, without licence of the owner of the house, or at least demanding of leave to see her daughter. Hill. 1649. between PARLET AND BOWMAN, adjudged upon demurrer.]*

(L. a) Trespass justifiable. In what Cases a Trespass may be justified.

See tit.
Hunting
(A), pl. 1.
and the notes
there.

In trespass
of killing a
mastiff dog
at E. in
Kent, the

defendant pleaded, that Sir F. W. was seised of a warren in D. in the same county, whereof he is and was warrener; and that the dog was divers times there killing conies, and therefore finding him there, tempore quo, &c. running after conies, he killed him. And all the Court held the justification good, it being alleged, that the dog used to be there killing of conies. Cro. J. 44. pl. 13. Mich. 2 Jac. B. R. Wadhurst v. Damme.——S. C. cited Saund. 84. Arg. in case of Wright v. Ramscot.

[1.] F a man lets a falcon fly at a pheasant in his own land, which pursues the pheasant into the warren of another, and there takes him, yet he cannot justify the entry into the warren of the other to take the falcon and pheasant. 38 E. 3. 10. b. 12 H. 8. 10.]

2. If a man hunts with a tumbler in my warren, yet I cannot justify killing the tumbler with my mastiff by my incitation. M. 3 Ja. B. LEWIN'S CASE.]

3. In every case where a man may avow he may justify; but not *contra*, per Yong, & non negatur. But see elsewhere, that if he justifies he shall not have return of the beasts. Contra upon avowry. Br. Justification, pl. 16. cites 5 E. 4. 6.

4. If A. takes the cattle of W. S. without cause, it is not lawful for J. N. to take them from him; for he has title against all, unless against the very owner; per all the Justices. Br. Trespass, pl. 433. cites 13 H. 7. 10.

5. Tres-

5. Trespass. *Tenant at will justified for digging a trench to avoid the water, which surrounded the common in another's land, appendant to the other land which he had at will, and to keep his own land from being surrounded.* And it was held double; for there are two matters, and the plaintiff demurred. Therefore quære; for two justices were against two. And there are diverse cases what a man may do *for the benefit of a stranger.* And there is a diversity where it is *in defence of the person of a stranger,* and where of *his goods or land.* And *for the commonwealth,* a man may extirpate the suburbs of a vill, or an house which is on fire. Br. Trespass, pl. 406. cites 12 H. 8. 2. 15. And cites the time of E. 4. that a man may make a bulwark upon another's land in defence against enemies.

[520]

6. If trees grow in my hedge, hanging over another man's land, and the fruit of them falls into the other's land, I may justify my entry to gather up the fruit, if I make no longer stay there than is convenient, nor break his hedge. Lat. 120. per Doderidge J.

7. In trespass the plaintiff declared, that the defendant killed his mastiff, &c. The defendant pleaded in bar, *that the plaintiff the same day, &c. suffered his mastiff to go in the street, not muzzled; and that he killed another dog of B. his mistress, which she kept for the security of her house; and that he, as her servant, adtunc & ibidem molossus præd. occidit to save the dog, and lest the mastiff should do any further damage.* And upon demurrer it was argued, that a mastiff is a valuable thing, and therefore the defendant cannot justify the killing it, without a reasonable cause; that he might justify the beating the mastiff to prevent any further mischief to the other dog, but not the killing it, unless it could not otherwise be prevented; and he has not said, that he could not have saved his mistress's dog without killing the mastiff. And of this opinion was the court, and gave judgment for the plaintiff. Saund. 84. Trin. 19 Car. 2. Wright v. Ramscott.

Sid. 336. pl. 1. S. C. accordingly.— Lev. 216. S. C. and the plea was adjudged ill, because he did not say that he could not save the other dog without killing the mastiff; and also because it does not appear that the plaintiff's dog was used

to bite, nor that the defendant's dog was a mastiff. — 2 Keb. 237. pl. 11. S. C. says, that Keeling Ch. J. said it was a sufficient justification; to which Moreton J. inclined. But adjournatur

8. In trespass of killing 2 greyhounds, the defendant justified, *because they chased a deer in his park, and killed him there.* The plaintiff replied, *that the deer was out of the park in his land eating his grass, and therefore he set his greyhounds on to chase him out of his land, and they followed him into the park, and there killed him.* Adjudged upon demurrer, that the replication was ill, for not saying *that he did his endeavour to stop the greyhounds at the side of the park,* to hinder their entering into it. But it was then objected, that the bar was ill; for though it was not lawful to chase in the park, yet the defendant ought not to have killed the greyhounds, when he had taken them; and cited 2 Roll. Abr. 567. [See supra, pl. 2.] LEWIN'S CASE. And e contra was cited 2 Cro. 44. * WADHURST v. DAM. And at another day, upon consideration of both books, judgment was given for the defendant. 3 Lev. 28. Mich. 33 Car. 2. C B. Barrington v. Turner.

* See supra, pl. 2. in the notes there.

(M. a) In what Cases a Man may justify, as incident to another Thing.

See tit.
Grants, (Z)
pl. 16. and
the notes
there.

[1. IF a man bargains and sells all his trees growing upon certain land whereof he is seised, the bargainee has power given to him as incident to the grant, to come upon the land, and cut down and carry away the trees at whatever time he please; and the coming upon the land is justifiable. Tr. 15 Ja. between STUKELEY AND adjudged per Curiam.]

S. P. by
Twisden J.
Vent. 43.
Mich. 21
Car. 2. B. R.
in the case of
POMFREY

[2. If a man grants to me, to make a trench in his soil from such a fountain unto my house, so that I may put a pipe to convey the water to my place [or house] in a conduit; if after my pipe be stopped, I may dig the ground to amend the pipe, for it is incident to the grant. 9 E. 4. 35. b. Curia,]

v. ROYCROFT; for quando aliquid conceditur, conceditur & id sine quo res ipsa uti non potest. — A farmer of the king of a capital messuage makes a conduit to convey water to his house, through the land of a copyholder of the manor, and afterwards the king grants the capital messuage to A. with the appurtenances; and the copyhold was granted to another person. Adjudged, that the farmer may dig the ground to amend the pipe; because terra transit cum onere. Mo. 644. pl. 889. Trin. 43 Eliz. B. R. Guy v. Brown.

* [521]

[3. So if I have such pipe by prescription, I may justify the digging of his land to amend it, without prescribing to do it; for it is incident to the thing prescribed. 9 E. 4. 35. Curia.]

4. Trespass of taking his servant and a scapery, viz. a garment, was brought by the prior of grey-friars in London. The defendant said, that the friar took his son and heir apparent, now named servant, and put him into a friars habit; and the defendant came into the church, and the son came to him with the scapery, and was only 11 years of age, and by award of the mayor of London he took the scapery. And it was challenged to be treble, viz. that he was son and heir, and was taken and carried away, in which case he might take him; and another, that he came to him, and the third, the award of the mayor of London. And per Hank. he may take his son and heir, if he be under 21 years, if he be not professed. And by the opinion of the Court, because the justification is good of the taking of the body; therefore it is good of the garments upon his back, and therefore a good plea for the scapery. And it was held there, that where a man puts another into apparel, it is a gift in law. And per Hank. if an adulterer takes the feme of a man, and cloaths her well with new cloaths, the baron may retake the feme with the cloaths. And after it was awarded, that as to the entry into the church, and the taking of the infant and the scapery, that the plaintiff take nothing by his writ. Br. Trespass, pl. 93. cites † 11 H. 4. 31.

† Mo. 214.
pl. 354. in
the Viscount's
of BONDON'S
CASE, cites
12 H. 4. S. P.
[but is mis-
printed, and
should be
11 H. 4. nor
are there so
many pages
in 12 H. 4.]

5. Trespass of a house broken and goods carried away. The defendant said, that the plaintiff's husband was seised in fee of the house, and possessed of the goods, and made the defendant executor, and died; and the defendant found the door open, and entered and took the goods, and the plaintiff supposing that she had been executor, took them, &c. And this was admitted good colour, and the plea was awarded

good

good per Cur. notwithstanding that the *plaintiff brought the action of her goods and the defendant justified of the goods of the testator.* Wherefore the plaintiff said, that the testator devised them to her, and the defendant delivered them to her after the testator's death, and after took them. And the defendant protestando, that they were not devised, and pro placito said, that he did not deliver them, and so at issue. Br. Trespass, pl. 9. cites 2 H. 6. 15.

6. Trespass quare clausum fregit, & averia cepit. The defendant said, that the plaintiff commanded N. to deliver to him the beasts, by which he entered and received them of N. And per Hufsey and Brian, the defendant may justify the entry by the command given to N. But per Choke, here the party may receive the beasts at the park-gate, and cannot enter by the command given to a stranger, by which the defendant changed his plea. Br. Trespass, pl. 342. cites 18 E. 4. 25.

7. Where a man is bound to make me a house before Michaelmas, and he is no carpenter, he may justify to bring a carpenter there to make the house. Br. Trespass, pl. 342. cites 18 E. 4. 25. Per Hufsey and Brian.

8. And where a man makes a letter of attorney to deliver seisin to W. S. there W. S. may justify the entry to take the livery. Br. Trespass, pl. 342. cites 18 E. 4. 25. Per Hufsey and Brian.

9. In trespass the defendant justified by custom of faldage by prescription of all cattle which pasture in such a common, &c. the plaintiff said that de son tort demesne without such cause. Br. De son tort, &c. pl. 31. cites 5 H. 7. 9. [522]

(M. a. 2) Trespass justifiable. By Lord. [Or Re-
versioner. Entry.] Fol. 568.

[1. HE in reversion may well enter the house in lease for life, to see whether it be well repaired, if the house be open. Pl. C. 13. a. in Manzell's case. 9 H. 6. 29. b.]

[2. But he in reversion cannot enter into the house where it is fastened up or locked, and break the windows. 9 H. 6. 29. b. Curia.]

(M. a. 3) Justification by Command. And Pleadings. See Traverse, (L.b.), pl. 11.

1. IN trespass of goods carried away, it is a good plea that the owner was outlawed, and he as servant of the escheator by his command took the goods; per Littleton. Br. Trespass, pl. 339. cites 18 E. 4. 9.

2. In trespass the defendant pleaded the franktenement of one A. and he by his command entered and did the trespass; the plaintiff said that before that A. had any thing, he was seised till by A. disseised, and he re-entered, and the trespass mesne; and no plea, but was compelled to say that he was seised till by the defendant disseised to the use

use of A. and he re-entered, and the trespass mesne, and well. Br. Trespass, pl. 429. cites 11 H. 7. 21.

3. In trespass of goods taken, per Keble, where a man *derives interest from the owner, as by command, de son tort, &c.* is no plea. Contra where he justifies in another's right, as to say that the franktenement is in a stranger, and he by his command, &c. Br. De son tort, &c. pl. 53. cites 16 H. 7. 3.

4. In trespass of chasing his cattle, the *defendant as servant to a copyholder of the manor of T. laid a prescription in the lord for common of pasture for him and his customary tenants of the said house, and so justified the chasing by command, and as servant to the said copyholder, and that he molliter drove them out of the common. The plaintiff replied de injuria sua propria absque tali causa.* And upon demurrer it was resolved that these words absque tali causa relate to the whole plea, and not to the command only; for all makes but one cause, and neither of them without the other is any plea by itself; and that here the issue will be full of multiplicity of matter, whereas an issue ought to be full and single; for in this case parcel of the manor demisable by copy, grant by copy, prescription for common, &c. and commandment will all be parcel of the issue. And judgment against the plaintiff. 8 Rep. 66. b. Mich. 6 Jac. Crogate's case.

5. In battery the defendant *pleaded a judgment, and execution had by E. his father against J. S. and that the plaintiff assaulted the bailiff to rescue the goods, whereupon he in aid of the bailiffs, and by their command molliter manus imposuit upon the plaintiff to prevent the rescue.* The plaintiff replied *de injuria sua propria, and traversed the command, &c.* The whole Court resolved that the traverse [523] was ill; for he might have done so of his own head to prevent a rescue, which is a tort and breach of the peace. 3 Lev. 113. Mich. 35 Car. 2. C. B. Bridgewater v. Betheway.

See (H. a. 2) (M. a. 4) Justification by *Licence.* And *Pleadings.* pl. 18.

Where licence is pleaded, the plaintiff shall not say de son tort demesne absque tali

1. **T**RESPASS of *chasing in his free chase; the defendant pleaded licence of the plaintiff to chace there; the plaintiff said that de son tort demesne absque tali causa, prist, and the others contra.* Br. De son tort, &c. pl. 33. cites 42 E. 3. 2. Contra 8 E. 4.

causa, but shall answer to the special matter. Br. De son tort, &c. pl. 30. cites 10 H. 6. 9. & 13. — S. P. Br. De son tort, pl. 41. cites 9 E. 4. 41. — S. P. Br. De son tort, &c. pl. 50. cites 20 E. 4. 4. — S. P. per Keble and Townsend. Br. De son tort, &c. pl. 53. cites 16 H. 7. 3.

2. In trespass it is a good plea *that the place where is the common gaol of the sheriff of L. and that W. N. is gaoler, who licenced the defendant to enter to speak with a prisoner, by which he did it, which is the same trespass; and a good plea per Choke J.* Br. Trespass, pl. 332. cites 14 E. 4. 8.

3. So where a parker licences a man to drink with him in his lodge, though the licence is derived by a servant, and not by the owner; per Choke J. Br. Trespass, pl. 332. cites 14 E. 4. 8

4. In

4. In trespass the defendant pleaded licence of the plaintiff to enter, and the plaintiff said that he broke his door and windows; this is no good replication without traversing the licence, inasmuch as it is a licence in fact. Br. Replication, pl. 55. cites 21 E. 4.

Contra of licence in law, as to enter into a tavern to drink, or to enter to see

waste, take distress, and the like, it is a good replication that he broke a cup, or staid all night, or killed the distress; for misusing a horse borrowed, &c. lies action upon the case, and not trespass vi & armis; but it is a good replication after the licence in fact executed, that he came back after the same day, and broke as above, &c. And the best opinion was that the other may rejoin to those, as to say that he did not break the cup, or stay there all the night, or he did not kill the distress, and shall not be compelled to say not guilty. Ibid.

5. Trespass for entering his house and taking his goods. The defendant pleads quoad the goods not guilty, and quoad the entry that the plaintiff's daughter licenced him, and that he entered by that licence. The plaintiff replies non intravit per licentiam suam. The first issue was found for the defendant, and the second for the plaintiff, that he did not enter by the licence, and damages assessed to 80l. It was moved in arrest of judgment that he ought to have traversed the licence, and not the entry by the licence, or the entry by itself, or the licence by itself, and not both together; and of that opinion were Williams and Yelverton; to which Popham agreed, had it been at the common law; but being tried, it is made good by the statute of 32 H. 8. which aids misjoining of issues; for an issue upon a negative pregnant is an issue; per quod adjornatur. Cro. J. 87. pl. 13. Mich. 3 Jac. B. R. Myn v. Cole.

(M. a. 5) Justification. Pleadings.

[524]

1. **TRESPASS** for breaking his house and close. The defendant justified that the plaintiff was his tenant for years, and he entered to see if he did waste, &c. The plaintiff said, that he staid there by a day and a night; and a good replication. Br. Replication, pl. 12. cites 11 H. 4. 75.

So of entry into a tavern, and the other said, that after his entry he took a cup and beat

his servant. Br. Replication, pl. 12. cites 11 H. 4. 75.

2. Trespass of nuisance, and of stopping a gutter, to the nuisance of the plaintiff in surrounding his land. The defendant prescribed to amend the gutter, and to stop the water during that time. The plaintiff said, that de son tort demesne, &c. and traversed the prescription modo & forma; and so to issue. Br. De son tort, &c. pl. 48. cites 39 H. 6. 32.

3. In trespass for pulling down his hurdles in his close, the defendant justified, for that one B. was lord of the manor of D. and that the said B. and all those whose estate he had in the said manor, had a free course for their sheep in the place where, &c. and that the tenant of the said close could not there erect hurdles without the leave of the lord, and that B. let to the defendant the said manor, and because the plaintiff erected hurdles without leave, &c. in the said close, he cast them down, as it was lawful for him to do. The plaintiff replied of his own wrong, without cause, &c. It was holden by the

justices to be an ill plea; for the plaintiff ought to have traversed the prescription. 4 Le. 16, 17. pl. 59. Trin. 26 Eliz. B. R. Rushbrook v. Pufanies.

4. In trespass of breaking his fences, and *eating up his grass with hogs*, the defendant pleads, *that the fences were out of repair*. The plaintiff demurs, because the defendant does not say *that they are the plaintiff's fences, nor that the plaintiff's close was contiguous adjacent*. Per Hale Ch. J. the not alleging that it was the plaintiff's mound seems not good, and then the plaintiff shall have judgment; and so he had. Freem. Rep. 347. pl. 432. Mich. 1673. King v. Rose.

5. All *strangers* who justify under process of execution, (except officers) ought to set forth the judgment; and so must the party who is plaintiff, if he justifies; per Holt Ch. J. Carth. 443. Hill. 9 W. 3. B. R. in case of Britton v. Cole.

Contra to former judgments, as in Cro. C. 138. Skevil v. Avery.—

6. In trespass, justification without shewing the commencement of his estate, or that freehold was in him, is not good, though possession is sufficient to count upon. 12 Mod. 506. Pasch. 13 W. 3. B. R. * Pell v. Garlick.

And 2 Mod. 70. Searle v. Bunion.—And 3 Mod. 32. Langford v. Webber.—And Carth. 9. S. C. —See Possession (1) pl. 2.

* Lutw. 1492. S. C.

[525] (N. a) Trespass excusable. What Act or Thing will excuse a Trespass.

[1.] *If my beasts escape (not contra pacem) into the land of J. S. and tramples his corn*, this escape shall not excuse me of trespass, but a writ of trespass lies against me for default of good keeping of them. 27 Ass. 56. adjudged. 12 H. 7. Kell. 3. b.]

[2. If A. leases land to B. for life, and after leases it to C. for years to commence after the death of the lessee, and then B. sows part of the land, and dies before severance of the corn, and afterwards C. enters into the residue of the land not sown, and puts in his beasts, and the beasts go against his will and feed the corn: this shall not excuse him, but the executor of B. shall have action of trespass for it; for he ought to take care of his beasts, that they do no damage to another man. And here the emblements belong to the executor of B. and he has liberty to permit them to grow there till a convenient time for their severance. M. 10 Car. B. R. between PITTS AND COLLIBEARE adjudged upon a demurrer. Intratur, Tr. 10 Car. Rot. 575.]

3. In false imprisonment, the defendant said that the father of the plaintiff held of his master by service of chivalry, and died, the plaintiff being within age; and he by command of his master, seized him, and detained him six months; and after one E. an elder brother of the plaintiff, who was ravished into Scotland, came back; and the defendant perceiving it, waived the plaintiff, and seized E. Judgment si actio, and a good plea. Br. Notice, pl. 19. cites 22 Ass. 85.

4. If

4. If the eldest brother goes over the sea, the youngest thinking that he is dead, cannot justify to enter into the land; per Portington. Br. Trespass, pl. 141. cites 21 H. 6. 14.

executors, thinking him dead, seize the goods, he shall have trespass; per Portington. pl. 141. cites 21 H. 6. 14.

So where a man makes executors, and goes beyond sea, the Br. Trespass,

5. If an infant delivers goods to the defendant, it is a good excuse in an action of trespass; but a gift by an infant is void. Br. Trespass, pl. 150. cites 22 H. 6. 3.

6. In trespass of cutting trees, &c. it is a good plea, that the plaintiff hired him to cut for 8 d. by which he cut, as lawfully he might, &c. Br. Trespass, pl. 383. cites 33 H. 6. 55.

7. In trespass the defendant said, that the close where, &c. adjoins to the king's highway from such a vill to such a vill, and he chased his cattle in the way, and they entered the close in default of inclosure of the plaintiff, which the plaintiff, and those whose estate, &c. have used to inclose time out of mind. And the defendant freshly pursued and reclosed, &c. by which the other said, that it was sufficiently inclosed, prist, &c. Nevertheless, per Danby and Littleton, if grain grows in a common field near the way, and the beasts feed, the defendant shall render damages; for there the plaintiff is not bound to inclose. Contrary above. And the issue was joined upon the sufficient inclosure, and not upon the inclosure only. Quod nota. Br. Trespass, pl. 321. cites 10 E. 4. 7.

8. And where a man has a private or particular way, which is not the king's highway for all, there if he, who has title, chases cattle which * enter and feed, trespass does not lie, though it be not inclosed; per Moyle and Choke. Br. Trespass, pl. 321. cites 10 E. 4. 7.

But if a man who has no right of way there, chases there, and his cattle enter, for

default of inclosure trespass lies; for the not inclosing is no matter to him who has no title to chase there; per Moyle and Choke. Br. Trespass, pl. 321. cites 10 E. 4. 7.

* [526]

9. If a man has common in D. and one W. S. has land adjoining, which he is not bound to fence, as in the field country; there the commoner is bound, when he puts his beasts in the common, to keep them that they do not go into the land of W. S. Per 2 justices. Br. Trespass, pl. 345. cites 20 E. 4. 10.

10. Justification in trespass for subverting his soil and feeding the grass, by a custom, that where he ploughs he may turn his plough upon the land adjoining, by which he did so, and his horses in the turning subverted a foot of land, and took a mouthful of grass against his will; and well. Br. Trespass, pl. 351. cites 21 E. 4. 28. and 22 E. 4. 8.

11. Trespass quare clausum fregit; it appeared that the defendant had a close adjoining to the highway, which was supposed to be the lord's waste, and that the cattle coming out of his close did casually stray in the highway, and for this the action was brought. Croke J. said, that if the cattle stay any time on the waste, and depasture there, the lord may have an action of trespass. And Fenner said the cattle ought not to feed in the highway; and as it appeared to be alta via regia, which made it the stronger against

See (1. s), pl. 23. S. C. but D. P.

against the plaintiff, he was against the action; and the whole Court disliked much of it, and were of opinion against the plaintiff; but the matter being upon compromise, they delivered no judgment. Bulst. 157. Trin. 9 Jac. Durand v. Childe.

Jo. 131. pl. 1.
MILLEN v.
FAWTREY,
S. C. ad-
judged ac-
cordingly,
and the jus-
tices held
further, that
if the dog

12. In trespass, the defendant *pleaded that the plaintiff's sheep were trespassing in his ground, and that he chased them out with a little dog, and he immediately re-called his dog, but the dog pursued them into the plaintiff's ground adjoining.* Upon demurrer, it was held that the action does not lie. And Doderidge J. gave for reason, that there was no hedge. And judgment was given for the plaintiff. Poph. 161. Pasch. 2 Car. B. R. Millen v. Fandrye.

had chased them out of the land where they were damage feasant *into the land of a stranger, and the party did his endeavour to recal the dog, no trespass lies; but Jones J. held it not lawful for the party himself to chase them into the land of a stranger, but to a highway only or a common, or to the land of the owner only.*——Lat. 13. MILLEN v. HAWERY S. C. adjudged accordingly, and same difference taken by Jones J. *as to the party's doing it by himself or by a dog, and where they drive them into the highway, and where into a common, &c.*——Lat. 120. S. C. and S. P. by Jones and Crew Ch. J. and Doderidge J. held that the action did not lie. And Jones agreed clearly, that the chasing with the dog was lawful, and took the difference between chasing by the party himself and where he does it by a dog; and said, that the party himself may *chase them into the land of the owner, unless it be into a common, and even there in case of necessity.* But that in all those cases it seems that trespass lies for the owners of the beasts, because it is not lawful to do a tort to another to ease myself; and that Doderidge said, that here is a damage to the owner of the beasts, but no injury; and that there never shall be trespass unless there is both damage and injury. But the reporter says that notwithstanding all this, judgment was given for the plaintiff.

13. *No excuse is good in trespass, but by inevitable necessity.*
2 Jo. 205. Pasch. 34 Car. 2. B. R. Dickenson v. Watson. See (G), pl. 1. in the notes, the case more large.

[527] (O. a) Trespass. What will be a *Discharge* of a Trespass. . *Death.*

[1.] *If trespass be done to the goods of the testator in the hands of the executor, if the executor after dies, his executor shall not have trespass for it, but moritur cum persona.* Contra, 18 H. 6. 22. b.]

Yelv. 89.
HIGGINS
v. BUT-
CHER, S. C.
but S. P. by
Williams

[2. If a man beats my servant by which I lose his service by diverse months, and after he dies, yet I shall have action of trespass against the trespassor; for this was a distinct trespass to me. Tr. 4 Ja. B. R. in HUGGIN's case by Williams.]

does not appear; but Tanfield said, that if one beat the servant of J. S. so that he dies of that beating, the master shall not have an action against the other for the butchery and loss of service, because the servant dying of the extremity of the beating, it is now become an offence against the crown, it being turned into felony, and this has drowned the particular offence, and private wrong done to the master before; and his action by that is gone; which Fenner and Yeiverton agreed to.——Brownl. 205. Huggins v. Butcher S. C. seems only a translation of Yelverton.

Yelv. 89.
Trin. 4 Jac.
B. R. Hig-
gins v. But-
cher, S. C.
and S. P.
agreed; for
damages
shall be

[3. But if a man beats my feme, by which she languishes by diverse months, and after dies, I shall not have action of trespass against him after for this trespass, because the trespass was not done to me but to the feme, so that the feme ought to have joined in the action, and I only for conformity. Dubitatur, Tr. 4 Ja. B. R. HUGGIN's case.]

given to the feme for the tort offered to the body of her.——Brownl. 205. Huggins v. Butcher, S. C.

S. C. and seems to be a translation of Yelverton. — Noy, 18. Higgins's case S. C. and S. P. by Tanfield. And per Cur. the action will not lie; for the king only is to punish felony, except the party brings an appeal.

(P. a) Trespass. At what Time. In what Cases it shall be defeated by Matter *Ex post Facto*.

Fol. 569.

[1.] IF one ravish my feme, and after we are divorced *causa frigiditatis*, yet I may have trespass for ravishment of my feme with my goods taken, &c. 43 E. 3. 23. 44 Ass. 13. adjudged.]

[2. So if a man ravish my feme, I may have trespass against him after the death of the feme, for ravishment of my feme with goods taken; for in this action he is not to recover the feme, but damages. 44 Ass. 13.]

3. If a man who has no right distrains in his own right, and after justifies as bailiff in right of the lord, this is no good justification, though the rightful lord agrees to it after. Br. Justification, pl. 14. cites 7 H. 4. 23. per Gascoigne.

But if he distrains as bailiff of the right lord, and is not his bailiff in

fact, and after the lord agrees and he justifies as bailiff, this is a good justification, per Gascoigne; but Br.oke says the law seems to be otherwise, for he was once a trespasser; for he had not any authority at the time of the taking, and therefore agreement after will not serve. Ibid.

4. If trespass be brought of beasts generally, and the plaintiff has the beasts again, this shall be given in evidence; for otherwise the plaintiff shall recover in value. Per Culpeper. And per Hank. where the value of the beasts is alleged in the writ, it is a good plea that the plaintiff himself is seised of the beasts. And per Hill, where the value is alleged the justices of nisi prius shall enquire of the value, not having regard whether the plaintiff has the beasts again or not. Br. Trespass, pl. 93. cites 11 H. 4. 23.

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5. If a man abates after the death of my father, and I re-enter, I shall have action of trespass; but contrary if I release; per Newton. Br. Trespass, pl. 127. cites 19 H. 6. 23.

6. If trespass be done upon tenant for years, and his term expires, he shall have trespass without regress; for his term is ended. Per Fulthorp. Br. Trespass, pl. 127. cites 19 H. 6. 23.

(P. a. 2) [Defeated by] Act of the Party.

[1.] [3.] IF a man takes my beasts without cause, and I sue a deliverance, yet trespass lies for the taking. 46 E. 3. 26. b. Contra, 7 H. 4. 15.]

[2.] [4. After a trespass upon my land, if I alien the land, yet I may have trespass for the trespass done before. 19 H. 6. 28. b.]

Br. Trespass, pl. 127. cites 19 H. 6. 23. per Ascough.

[3.] [5. If bailee of goods brings trespass, and bailor other trespass, he that first recovers shall oust the other of his action. 48 E. 3. 21. 20 H. 7. 5. b.]

[4.] [6. If the owner retakes his goods from the trespassor, yet he shall have trespass for the taking. 11 H. 4. 24. b.]

13 Rep. 69. Per Cur. in case of

HEYDON V. SMITH, cites 11 H. 4. 23. S. P.

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not have
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of the tresp-

pas done after the disseisin : but contrary of the trespass which is the disseisin ; per Newton. Br. Trespass, pl. 127. cites 19 H. 6. 23.

5. If a man *breaks my house, and ousts me, and another man disseises him, and I release to the 2d disseisor, yet I shall have trespass against the first disseisor ; per Ascough. Br. Trespass, pl. 127.*

6. If *A. recovers land by judgment against B. and then J. S. does a trespass, and after B. reverses the judgment for error, yet A. shall have trespass against J. S. For B. cannot have remedy but only against A. and not against strangers. And as the law charges A. with all the mesne profits, so it gives him remedy, notwithstanding the reversal, against all trespassers in the interim. 13 Rep. 21, 22. in Ninian Menvil's case.*

(P. a. 3) [Defeated by] Acts of a Stranger.

Br. Con-
tract, &c.
pl. 9. cites
11 H. 4. 23.
contra. That
it is in a man-
ner agreed

[1.] [7.] *If a man takes beasts out of the possession of a lessee of them for a year to compost his land, trespass lies against this stranger ; and if the lessor after sells the beasts to the trespassor, yet trespass lies for the * trespass done before. Dubitatur, 11 H. 4. 24. b.]*

that such sale extinguishes the action of the lessee ; and Hank. was precise in it ; quod mirum ! for trespasser has property, and then the sale of the first owner is void ; quod quære. — Br. Trespass, pl. 92. cites S. C. accordingly by Hank. and compared it to the case of a disseisin of A. by B. and then B. is disseised by C. and afterwards A. releases to C. now the action of B. is determined.

* [529]

(Q. a) Trespas. Gift of the Action. In what Cases it lies for an Act by Virtue of an Office.

Br. Quin-
zime, pl. 3.
cites S. C.
Per Hank.
that if a col-

[1.] *If a man be assessed to pay a 15th by force of a commission, and had been assessed in time before, yet if he ought not to pay it, trespass lies against the collector, if he levies it. 11 H. 4. 35.]*

lector distrains for fifteenths him, who ought not to pay it, trespass does not lie. — But it is said there, that where a man is assessed to fifteenths for his beasts in D. where he has no beasts there, and is distrained by the collector, he shall have trespass against him, and he shall not have aid of the king. Ibid.

2. If a *sheriff serves a capias where there is no original, trespass does not lie ; per Hank. Br. Quinzime, pl. 3. cites 11 H. 4. 35.*

Br Patents,
pl. 3. cites
S. C.

3. Where the king or the *escheator seises by insufficient office, which does not intitle the king by the law, a man shall have trespass against the escheator or grantee of the king, &c. Contra where the escheator seises by reason of a writ where the king has not title. Br. Trespass, pl. 15. cites 9 H. 6. 20.*

(Q. a. 2) *One or several Trespases. What shall be said to be.*

1. **TRESPASS** against 2 of trees cut. The one justified for himself of common there, and the other for common there for himself, and are found guilty, and damages taxed entirely; and by the best opinion it is well; for it is but one and the same trespass, though the answer be several. Br. Damages, pl. 202. cites 11 H. 7. 19, 20.

2. *Contra* in trespass against two of 2 horses taken; for it is a several trespass. Br. Damages, pl. 202. cites 11 H. 7. 19, 20.

3. If a man cuts a tree and carries it away presently, it is not felony, but one intire trespass; per Hale Ch. J. Freem. Rep. 23. pl. 29. Hill. 1671. in case of Emerson v. Amell.

(Q. a. 3) *Vi & Armis. In what Cases Trespass lies [530]*
Vi & Armis. In respect of the Persons.

1. *Marlb. 3.* **ENACTS**, that if any distrain his tenant for services and customs, or other thing for which the lord of the fee hath cause to distrain; and after it is found that the services are not due*, the lord shall not therefore be punished by redemption. This branch is interpreted, that the lord shall pay no fine; and therefore by

a consequent, since this act no action of trespass quare vi & armis lies against the lord in this case; for then he should pay a fine. But at the common law trespass vi & armis did lie. 2 Inst. 105.

* If the lessor ousts the lessee for years, trespass vi & armis lies, notwithstanding the statute that the lord shall not therefore be punished by redemption; for he may distrain or see waste, but not retain the possession; for this act is not done as lord, and so out of the case of the statute. Br. Trespass, pl. 384. cites 38 E. 3. 33. and 48 E. 3. 6. and 5 H. 7. 10.—2 Inst. 106. S. P. and cites same cases, and 28 E. 3. 97.

Trespass quare vi & armis *clausum fregit*, and taking his beasts; the defendant said that he leased the land where, &c. for 10 years rendering rent, and so the land is held of us, and within our fee, judgment of the writ vi & armis; and as to the close broken he was compelled to answer by award; quod nota. And if the writ vi & armis lies between lessor and lessee adjournatur; therefore quare. Br. Trespass, pl. 65. cites 48 E. 3. 5, 6.—Br. Brief, pl. 513. cites S. C.

And another such case was brought by the lessor and J. B. and said there, that because covenant lies of the ouster against the lessor only, and not against the other who was not party to the lease; therefore trespass vi & armis lies against *hob.* Br. Trespass, pl. 65. cites 48 E. 3. 6, 7. and says, see 38 E. 3. fol. 33. that it lies against the lessor alone; and herewith agrees 5 H. 7. 10. *Ibid.*

Trespass vi & armis lies by the lessee against his lessor for years, by the opinion of the justices; for lessee for years shall do † fealty, and therefore the lessor hath fee there; by which the plaintiff said that the lessor hath nothing but in right of his wife, who is dead since the lease, and never had issue. Quare; for then it seems that the reversion is descended to the heir of the same, and then the defendant hath not fee there; and the defendant's plea was that he leased for years to the plaintiff rendering 10s. rent, and for the rent arrear he entered and distrained; judgment of the writ vi & armis, and this case was not adjudged. Br. Trespass, pl. 18. cites 9 H. 6. 43.

† 2 Inst. 106. says, that the word (dominus) in this act is extended to the lessor upon a lease for life, or for years; for the lessee for years shall do fealty also.—And Br. Trespass, pl. 344. cites 20 E. 4. 2. accordingly, that it shall be intended as well to the lessor for term of years, as between other tenant and his lord; per Cur.—But *Ibid.* pl. 173. cites 5 H. 7. 10. it is said, per Cur. that it is intended between lord and tenant, and not between lessor and lessee.

Trespass vi & armis, the defendant justified as bailiff for rent arrear, within the fee of his master, and demanded judgment of the writ vi & armis. Hill said, that the writ is good enough against the bailiff vi & armis, notwithstanding the statute of Marlbridge, cap. 3. that the lord shall not therefore be punished by redemption. Contrary against the lord himself. Br. Trespass, pl. 98. cites 11 H. 4. 78. and 9 H. 5. 14.—S. P. *Ibid.* pl. 220. cites 7 H. 6. 3. per Cur.—S. P. *Ibid.* pl. 377. cites 2 H. 4. 4. for the statute is to be taken strictly.—S. P. 2 Inst. 106. for the bailiff is not dominus.

2. In trespass the defendant *avowed for heriot arrear, &c.* And the plaintiff said that *de son tort demesne* without such cause, and the defendant tendered *demurrer, because the writ is vi & armis* where he is lord, and yet the defendant was compelled to join the issue as the plaintiff had tendered; *quod nota.* Br. De son tort, &c. pl. 5. cites 44 E. 3. 13.

Br. Trespass,
pl. 88. cites
S. C. —
—S. P. Br.
Brief, pl.
407. cites
10 H. 6. 24.

3. Trespass vi & armis. The defendant said that the plaintiff held three acres of him by fealty and 3d. and for the rent arrear be distrained; judgment of the writ vi & armis, and a good plea. Br. Brief, pl. 115. cites 8 H. 4. 16.

held a good plea per Cur. whether any rent be arrear, or not.

Br. Tres-
pass, pl. 92.
cites S. C.

4. In trespass, if a *feme covert* delivers the baron's goods to W. N. trespass vi & armis lies against W. N. per Skrene, which Hank. denied; the reason seems to be because *feme has lawful meddling* with goods of the baron. And it is agreed that such taking is not felony; but *quare* of trespass. Br. Baron and Feme, pl. 36. cites 11 H. 4. 24.

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5. Trespass of a close and house broken vi & armis, the defendant pleaded *not guilty to the force and arms*; and to the rest, that he was seised, and leased to the tenant for years, and came there to see if waste was done. Judgment; and a good plea; per Hill and Hank; but Thirn contra. Br. Trespass, pl. 97. cites 11 H. 4. 75.

S. P. Ibid.
pl. 362. cites
22 E. 4. 5.

6. If the lord distrains his tenant for rent, where none is arrear, or such like, which may be intended to be done as lord, trespass does not lie vi & armis. Br. Trespass, pl. 16. cites 9 H. 6. 29.

Br. Labour-
ers, pl. 29.
cites S. C.

7. Where a man beats him who serves me at pleasure, or an infant whose covenant is void, yet I shall have action upon the case for the battery, for the loss of my service. And the same law where I retain a man who is beat, &c. and here it lies for the master vi & armis. Br. Action sur le Case, pl. 55. cites 21 H. 6. 8, 9. and Register, 102, and 182.

8. Trespass *quare vi & armis clausum fregit*, and cutting his trees. And to the entry the defendant said, that the plaintiff held of him by fealty and rent, and demanded judgment of the writ vi & armis. And per Cur. it is no plea, unless he says that the rent was arrear, and that he came to distrain; and yet it shall not be traversed. But if no rent be arrear, he cannot enter unless as a stranger, who shall be a trespassor; by which the defendant pleaded accordingly, and as to the trees cut, not guilty. And per Cur. this is no plea to the writ above, but to the action; for the action does not lie vi & armis against the lord, who demeans himself as lord; by which the plaintiff said, that he held of B. and not of the defendant. And it was said, that writ of trespass of close broken does not lie without vi & armis; but justices may be without vi & armis. Br. Trespass, pl. 317. cites 8 E. 4. 15.

9. In replevin, if the lord claims property and will not avow, trespass lies vi & armis, and he shall make fine and ransom. Br. Trespass, pl. 317. cites 8 E. 4. 15.

10. Tres-

10. Trespas vi & armis. The defendant *justified for distress by tenure of him by rent and services.* And the plaintiff pleaded, that *riens arreare;* and found for the plaintiff, by which he demanded judgment. And the defendant alleged the *statute of Marlbridge,* that the lord shall not therefore be punished by redemption, and by all the justices, because the statute is *negative and restraining;* and it appears in the record, that the defendant is confessed to be lord, therefore the plaintiff shall not have judgment. Br. Judgment, pl. 121. cites 10 E. 4. 7.

11. Trespas vi & armis does not lie where my bailiff cuts trees without cause, or * kills my cows, sheep, &c. nor where my bailiff or butler breaks my bowl, &c. for he has lawful possession of them. And yet see 13 E. 4. fo. 9. that if he steals them it is felony; for it is the possession of the master. But in the first case, trespas lies upon the case. Quod nota. Per Chocke and Catesby. Br. Trespas, pl. 343. cites S. C. —
† S. P. per Colow. Br. Trespas, pl. 8. cites 22 E. 4. 5.

Action sur le Case, pl. 99. cites 18 E. 4. 27.

12. If a man takes my cattle out of the possession of him to whom I bail them, I shall have trespas vi & armis; per Colow. Br. Trespas, pl. 362. cites 22 E. 4. 5.

13. Trespas quare vi & armis he cut his trees. The defendant justified as servant, and by command of the tenant at will of the lease of the plaintiff. And per Brian, the plea is not good; for the tenant at will himself cannot do it; because he cannot grant the land over, for he has strict interest, and therefore trespas vi & armis lies. Br. Trespas, pl. 362. cites 22 E. 4. 5.

14. If tenant at will himself cuts the trees, trespas lies vi & armis; per Colow. Br. Trespas, pl. 362. cites 22 E. 4. 5.

15. Trespas quare clausum fregit, & averia cepit, & abduxit. The defendant said, that the place was his franktenement, and the cattle were damage feasant, by which he took them. The plaintiff pleaded lease for * years made by the defendant, which yet continues. And the defendant demurred, because it was vi & armis; and yet the writ is good, per tot. Cur. by reason of the breaking of the close. Br. Trespas, pl. 273. cites 5 H. 7. 10.

But it was in a manner agreed, that if the defendant had justified for rent, as he justified for the seal, that the writ vi

& armis had abated. Br. Trespas, pl. 273. cites 5 H. 7. 10.

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16. In several cases a man who is tenant of the franktenement shall be punished by trespas vi & armis for an act done in his own franktenement. Br. Trespas, pl. 273. cites 5 H. 7. 10.

As lord of the warren shall have trespas vi & armis,

against the owner, quare vi & armis warrennam suam intravit. Br. Trespas, pl. 273. cites 5 H. 7. 10.

And if a man grants *visum terræ* for term of years, and the grantor takes the vesture, there the grantee shall have trespas vi & armis. Br. Trespas, pl. 273. cites 5 H. 7. 10.

So if a man sells his trees, and afterwards cuts them, the vendee shall have trespas vi & armis. Br. Trespas, pl. 273. cites 5 H. 7. 10.

And so of other liberties and profits in another's land, which was agreed by all the justices. Br. Trespas, pl. 273. cites 5 H. 7. 10.

17. If the lord does an act in the land of his tenant which does not belong to him to do as lord, as labour the distress, or † kill it, or † cut trees, trespas lies vi & armis. Br. Trespas, pl. 273. cites 5 H. 7. 10.

† S. P. per Littleton. — Ibid. pl. 317. cites 8 E. 4. 15. — S. P.

Ibid. pl. 362. cites 22 E. 4. 5.

¶ S. P.

¶ S. P. So if he breaks a door, or a window, &c. which cannot be intended as *lard*, there the tenant may have a writ of trespass quare vi & armis against the lord, notwithstanding the statute of Marlbridge, cap. 3. Br. Trespass, pl. 16. cites 9 H. 6. 29.——S. P. And so if he feeds the ground of his tenant, or the like. 2 Inst. 106.

So if the lord breaks the gates or hedges, trespass lies vi & armis. Br. Trespass, pl. 344. cites 20 E. 4. 2.

18. *The lord cannot break the close to distrain ; but shall have assise, if it be so inclosed that he cannot enter to distrain.* Br. Trespass, pl. 273. cites 5 H. 7. 10.

19. Holt Ch. J. declared for law, that no action of *trespass vi & armis* would lie *for a tenant at will against his landlord* for the lord's entering or distraining for rent, &c. 11 Mod. 209. pl. 13. cites D. 119. 10 E. 4. 7.——2 Inst. 105.——Mo. 105.

(Q. a. 4) Vi & Armis. In what Cases Trespass lies Vi & Armis. *In respect of the Thing, &c.*

Br. Quod permittat, pl. 5. cites S. C. —S. P. Br. Trespass, pl. 47. cites 44 E. 3. 20.

1. **I** F a man ought to grind his grain toll free, and the miller takes toll, trespass lies vi & armis, and not action upon the case ; quod nota. Br. Trespass, pl. 41. cites 41 E. 3. 24.

2. It was awarded for law to be a good plea in trespass of taking of goods vi & armis, to say *that the defendant had deliverance thereof by replevin ; judgment of the writ ; for after this the plaintiff shall not have trespass, but shall pursue by the replevin ; and such deliverance is by the law, and not as trespass, and therefore the defendant who obtained deliverance of it by replevin, is no trespassor, nor trespass vi & armis does not lie of such taking by replevin ; quod nota.* Br. Trespass, pl. 48. cites 44 E. 3. 20.

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3. If vi & armis be *at the commencement*, it shall refer to all the matter ensuing. Br. Trespass, pl. 112. cites 38 E. 3. 15, 16.

4. Trespass quare vi & armis, *he took his boat and nets, the defendant said that this taking was in the county of H. and there was deliverance made by the sheriff, judgment of the writ vi & armis, and adjournatur ; it seems that of deliverance made by the sheriff trespass does not lie vi & armis.* Br. Trespass, pl. 76. cites 2 H. 4. 16.

5. Trespass upon the case, inasmuch as the defendant vi & armis *stopped a sewer* in L. by which 40 acres of his land are surrounded to the damage, &c. And the writ vi & armis awarded good of stopping ; *contra of laches of nonfeasance, or not repairing, &c. by which the land is surrounded, there the writ shall not be vi & armis.* Br. Action sur le Case, pl. 46. cites 12 H. 4. 3.

6. In assise, the disseisin shall not be supposed to be with force, if it be not inquired and presented. But in trespass, if the issue passes against the defendant, it shall be intended to be with force and arms, and the party shall make fine ; note the diversity. Br. Trespass, pl. 119. cites 7 H. 6. 40.

7. In trespass, if a man breaks my hedge to the damage of 4d. and beasts of the common enter and do much damage, *I shall recover damages against him in respect of all the other damages, per Jenny and Finch.* Brooke makes a quære if he shall have trespass vi & armis,

armis, and give all in evidence, or shall have it vi & armis of the breaking, and action upon the case for the other damage by the entry of the beasts; and says it seems, that he shall recover all the damages by the general action of trespass vi & armis. *Quære* if trespass vi & armis and upon the case may be all in one and the same writ. Br. Trespass, pl. 179. cites 9 E. 4. 4.

8. Trespass quare vi & armis *columbar suas cum pantello & aliis ingeniis cepit*; and by the serjeants the action quare vi & armis does not lie; but *de columbario fracto & columbis captis*, action lies vi & armis; *quære*, for there is no property. But there in the next case trespass was brought of a goishawke, and hawk taken and carried away. Br. Property, pl. 30. cites 16 E. 4. 7.

9. If a man comes into a tavern, and takes the cup or beats the servant of the house, trespass lies vi & armis for this *misusage* after, and yet his first authority was good; per Colow. Br. Trespass, pl. 362. cites 22 E. 4. 5.

10. In trespass, the defendant said that the plaintiff himself was seised in fee, and leased to the defendant for 6 years, and that after the term ended, the defendant held himself in, and did the trespass of which the plaintiff has brought this action before any entry. Judgment, &c. And by all the justices, trespass vi & armis does not lie before that the plaintiff has made regress, as here; *quod nota*. Br. Trespass, pl. 365. cites 22 E. 4. 13.

11. If the writ of trespass be returnable, then these words vi & armis shall be in the writ; and if it wants those words it shall abate, unless they are writs of trespass upon the case, which writs shall not have these words although they are returnable in C. B. or B. R. and if they have the words quare vi & armis, it shall be good cause to abate them. F. N. B. 86. (H).

12. If beasts are taken in a common, or other land which belongs not to the owner of the beasts, yet he shall have trespass vi & armis, but not quare clausum fregit. Br. Trespass, pl. 421. cites 3 M. 1.

13. In trespass of assault, beating and wounding the plaintiff, and taking a bag with 100*l.* in it, but because there was no vi & armis in the declaration, which must necessarily be in trespass, and is not matter of form but substance, and not aided by any of the statutes, a judgment in B. R. was reversed. Cro. J. 443. pl. 19. Mich. 15 Jac. in the Exchequer-chamber, Taylor v. Welsted.

14. Trespass for breaking his house and taking away his dishes, the defendant justified under a by-law; but that being ill the plaintiff demurred; but because the declaration wanted the words vi & armis, the Court held it naught upon a general demurrer, being an omission of the substance; for it alters the judgment from a *capitur* to a *misericordia*: besides, it belongs to the county court if it be trespass without vi & armis. 2 Salk. 637. pl. 3. Trin. 3 W. & M. B. R. Wildgoose v. Kellaway.

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But see now the statutes of 16 & 17 Car. 2. cap. 8. and 4 & 5 Ann. cap. 16. at tit. Amendment and Jeofail.

(Q. a. 5) *Contra Pacem. In what Cases it shall be Contra Pacem.*

1. **TRESPASS** of taking his beasts *contra pacem*, the defendant justified for distress for a tenure, by which he distrained with the peace, and not *contra pacem*. The plaintiff said, that de son tort demesne, and *contra pacem*, without such cause; and the others *e contra*; and so to issue without exception. Br. De son tort, &c. pl. 37. cites 24 E. 3. 72.

2. Trespass of *corn trampled*. The defendant said, that not guilty. The jury found that the beasts trampled it *by escape*, to the damage of 5s. but not *contra pacem*. Tank. said, in this case he ought to have a bill without these words *contra pacem*. And because it was *in default of good keeping*, therefore the plaintiff recovered. Br. Trespns, pl. 249. cites 27 Ass. 56.

3. Trespass of taking the horse of the plaintiff at D. of the price of 10l. and carrying it to P. and there killing him *contra pacem*; and because there is a mean time between D. and P. and so the defendant as trespassor had property, and then the killing at P. cannot be of the horse of the plaintiff, therefore per opinionem the bill shall abate; by which he brought another bill that the defendant had killed the horse of the plaintiff at P. *contra pacem*, and then well. Br. Trespns, pl. 250. cites 27 Ass. 64.

4. Trespass upon the case, for not repairing and amending his bank, and [scouring his] rivers, by which 30 acres of the plaintiff's land was surrounded, so that he lost the profits thereof for 5 years, to the damage of 30l. But because the writ was *contra pacem*, it was *abated*. Br. Action sur le Case, pl. 20. cites 45 E. 3. 17.

5. In trespass the plaintiff declared of chasing his cattle, *vi & armis*, into the close of J. S. who took them damage feasant, and compelled the plaintiff to pay him 40s. for the damages. After verdict it was moved in arrest of judgment, that the declaration had not *contra pacem*, as it ought to have; because the bill is in placito transgressionis, and the declaration was *vi & armis*. But it was answered, that the action was not brought merely for the chasing the cattle, but for chasing them into another man's lands, so as they were trespassors, and he was forced to compound for the damage; and its being *vi & armis* does not prove it to be an action of trespass; for these words may be in an action on the case, as in 9 Rep. 50. the EARL OF SALOP'S CASE. And though the recital of the bill be in placito transgressionis, it is not of necessity to be trespass only, but may serve for trespass on the case. And all the Court being of that opinion, it was adjudged for the plaintiff. Cro. C. 325. pl. 7. Mich. 9 Car. B. R. Tyffin v. Wingfield.

[535] 6. Trespass. The words *contra pacem* were omitted in the declaration; and therefore after execution of a writ of inquiry, judgment was arrested upon motion. But Holt Ch. J. seemed to incline, that it would have been good after verdict. Mr. Knott. 1 Ld. Raym. Rep. 38. East. 7 W. 3. Melwood v. Leech.

7. It

7. It was said, arg. that since the *capiatur pro fine* is taken away, it is not necessary to allege the *trespas contra pacem*. But Holt Ch. J. denied it, and said, it is the *vi & armis* that may be omitted. 2 Ld. Raym. Rep. 985. Trin. 2 Ann. in case of Day v. Muskett.

(Q. a. 6) *Writ and Declaration.* Good or not.

1. **T**HE writ in trespass contains only a *general complaint*, without the expression of *time or damage*, which might have been at any time done, and was intended to defend the estate itself against the invasion of the neighbours, and seems to have been thus generally allowed *before the distinction of bounds*; and therefore *the vill only was alleged* where the trespass was supposed to be done, and the plaintiff might count of any trespass committed before the suing out of the original. G. Hist. C. B. 3. cap. 1.

2. In trespass *vi & armis* for *cancelling a deed*, and set forth, that J. S. the defendant, being seised of land in fee, *infeoffed A. and his heirs with warranty, reserving rent, with clause of distress; and afterwards by deed bargained and sold the rent to the plaintiff, who casually lost the said deed, and the defendant found and cancelled it;* but did not expressly shew that he was at any time, before the action brought, possessed of this deed, but only by implication argumentatively. By the whole Court, the plaintiff ought here in his declaration to have shewed, that he was possessed of the deed before, which he has not done; and so, for this omission, the declaration is not good. And the rule of the Court was, *quod querens nil capiat, per billam*. 1 Bulst. 214. Trin. 10 Jac. Suckfield v. Constable.

Yelv. 223. S. C. by name of SUTCLIFFE v. CONSTABLE, held accordingly, upon the 3d exception there. — Brownl. 222. S. C. accordingly, and seems to be only a translation of Yelverton.

3. In trespass for *entering his close on such a day, and detaining possession usque diem exhibitionis billæ*; and did not allege what day the bill was exhibited. The plaintiff had a verdict. It was objected, that it ought to have appeared to the jury how long the defendant had detained the possession, that they may proportion the damages accordingly, and that its appearing to the court of record is not material; and of this opinion was Doderidge J. And Broome informed the Court, that the usage was to limit a day certain in the declaration. 2 Roll. Rep. 135. Mich. 17 Jac. B. R. Sliford v. Goodricke.

4. In trespass for taking his goods and chattels, it was adjudged, that if the words *pretii* and *ad valentiam* are omitted, after a verdict it is aided by the statute of jeofails. Sid. 39. pl. 1. Pasch. 13 Car. 2. B. R. Usher v. Bushell.

5. In trespass the entry was *quod cum predict. &c.* and this being moved in arrest of judgment, it was staid per Cur. Keb. 130. pl. 52. Mich. 13 Car. 2. B. R. Shepherd v. Tomkins.

6. In trespass for *chasing and driving his cattle to places unknown, so that he lost them*, the Court was of opinion, upon demurrer, that the declaration was ill, because hereby the plaintiff shall have damages as well for chasing as for driving to places unknown, whereby

2 Keb. 76. pl. 62. S. C. that the demurrer was on 1 Car. 20. pl. 24.

[Cro. C. 20. whereby he lost his cattle. Sid. 295. pl. 16. Trin. 18 Car. 2. pl. 13.] *Tbe* B. R. Cooper v. Coatabed.
trespass of
driving being drowned by the trespass of chasing away. But the Court doubted on 10 H. 7. debt on contract and obligation. But adjournatur.

[536] 7. In trespass for taking goods it was moved in arrest of judgment, because it was *not said (sua.)* And per Cur. it is ill, and judgment staid; but *in custodia sua existent* were sufficient. 3 Keb. 100. pl. 44. Hill. 24 Car. 2. B. R. Gallant v.
 8. Trespass of *entering a close, and pulling down and carrying away posts, &c.* As to the posts, on not guilty, and justification of entry for a way, found against the defendant, and damages 1d. and judgment. The defendant assigned for error, that it was not said *ad valentiam*, which as to chattels, distinct from freehold, ought to be; sed non allocatur; for per Curiam, this is but form, and aided by 21 Jac. cap. . . and judgment affirmed. 3 Keb. 728. pl. 13. Hill. 28 Car. 2. B. R. Hingly v. Saunders.
 9. Trespass for that on 1 May, &c. he broke and entered his close, and *digged his land, and carried away 20 loads of soil, valoris 40s. continuando the said trespass as to the digging, taking, and carrying away the earth and soil aforesaid, from, &c. ad damnum 30l.* Adjudged ill, because *no value is mentioned of the soil carried away during the continuando.* 2 Lev. 230. Mich. 30 Car. 2. C. B. Strode v. Hunt.

10. Trespass for taking and carrying away *averia ipsius quer. viz. unum equum, &c. nec non unum galerum, Anglice, one hat.* After verdict it was moved in arrest of judgment, that as to the hat there is no property laid in the plaintiff; and judgment was stayed. 2 Show. 395. pl. 365. Mich. 36 Car. 2. B. R. Dannet v. Collingdell.

11. In trespass the plaintiff declared *quare vi & armis clausum fregit*; and after verdict for the plaintiff judgment was arrested; for *quare* is not positive but interrogatory, and much worse than *quod cum.* Salk. 636. pl. 2. . . . 1 W. & M. B. R. Hore v. Chapman.

12. Trespass *quare clausum fregit & solum & fundum, viz. duas acras terra did dig, subvert, and carry away.* After verdict it was moved that the declaration was insufficient as to the digging and carrying away the soil; for *duas acras terræ signifies only the measure and extent of the ground where the digging was, and not the quantity of soil carried away.* And for this reason judgment was staid per tot. Cur. 2 Vent. 174. Pasch. 2 W. & M. in C. B. Highway v. Derby.

13. Trespass, &c. *quare clausum fregit, & diversas pecias mæheremii cepit, &c.* After a judgment by default, and a writ of enquiry returned, the judgment was stayed for the uncertainty of the declaration. 2 Vent. 262. Hill. 2 & 3 W. & M. in C. B. Anon.

14. The writ was *quare vi & armis* he broke the plaintiff's house, and took and carried away *bona sua*; but the declaration was of breaking the house, and taking *bona & catalla*, but left out
 (sua)

(fun) and also *(vi & armis)*. After judgment by default, it was moved in arrest of judgment, 1st, That the declaration was ill, because of the omission of *vi & armis*. 2dly, Because it did not allege that he had property in the goods. But it was answered, that in * *C. B. the writ is part of the declaration*; and that the omis-

* See tit. Property (M), pl. 202 Jones v. Pritchard.

15. Trespass for breaking his close, and *throwing bricks and other materials there lying erga confectionem domus de novo erect. into the sea*. It was held that the declaration was repugnant and insensible; for there could not be materials towards the building a house which was *de novo erect.* for then it is already built. 2 Salk. 458. pl. 3. Mich. 9 W. 3. B. R. Lodie v. Arnold.

16. Trespass of assaulting and *beating the plaintiff, &c. and breaking and entering his house, and also that they assaulted and menaced his sons and daughters, nec non E. N. servam suam, & alia enormia, &c.* Upon not guilty pleaded the plaintiff had a verdict. It was objected that the master could not maintain trespass for beating his servant, without some special damage, which ought to be shewn; but resolved that this action was for breaking and entering the house, and the further description is only to shew the enormity of the trespass, and by way of aggravation of damages for the breaking and entering the house. 2 Salk. 642. pl. 14. Trin. 5 Ann. B. R. Newman v. Smith.

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(Q. a. 7.) *Pleadings in Trespass. Good, or not. And what shall be a good Plea.*

1. **T**RESPASS in C. it is no plea to the writ that the place where, &c. is in K. and not in C. but he may justify in K. *absque hoc* that he is guilty of any trespass in C. And so he did for common appendant in the place where, &c. and the defendant was not compelled to the general issue not guilty in C. but shall have the special plea with traverse, as above, by which the plaintiff was compelled to reply that guilty in C. prout, &c. prout; per Cur. Br. Trespass, pl. 176. cites 4 H. 6. 13.

2. Trespass of breaking his close, and spoiling his grass in D. Chaunt. said the place is a carve of land called A. in which the defendant, and those whose estate he has, have held in common with the plaintiff and those whose estate he has time out of mind, and held in common the day of the writ purchased, by which he entered, &c. and a good plea per tot. Cur. Br. Trespass, pl. 122. cites 8 H. 6. 16.

3. In replevin it is a good plea that the property is in a stranger. Contrary in trespass; for there he may plead not guilty; note the diversity. Br. Trespass, pl. 382. cites 20 H. 6. 18.

4. In trespass of goods taken in Coventry, the defendant pleaded delivery in London, by which he took them in London, and no plea, by which he pleaded delivery at L. by which he took them at C. and

no

no plea ; for if they were delivered he has possession immediately ; but gift in L. by which he took them in C. is a good plea ; *quod nota*, per omnes & per Prisot. Br. Trespafs, pl. 33. cites 34 H. 6. 5.

5. In an action in which the thing shall be recovered, as in *quod permittat*, *assise*, &c. and in trespafs of goods, it is no plea to say that the plaintiff had no goods ; for this amounts to not guilty. Br. Trespafs, pl. 34. cites 34 H. 6. 28. 43.

6. Trespafs of a house broken, and goods taken, the defendant said that the plaintiff at the time, &c. held the house of him by 10s. rent, &c. and for so much rent arrear such a day, he took the goods as distress. The plaintiff said that he did not hold the house of him, *prist*, and the others *e contra* ; and a good issue per Cur. for in replevin and rescous *hors de son fee* is a good plea, *contra* in trespafs ; for here he cannot disclaim or answer to the fee, for the defendant does not suppose that he has fee there, but that he holds of him ; and therefore that he does not hold of him is a good plea ; *quod nota*. Br. Issues Joines, pl. 26. cites 38 H. 6. 26.

7. In an action by warden nor sheriff, it is a good plea that he was not warden nor sheriff at the time, &c. Br. Trespafs, pl. 326. cites 12 E. 4. 7.

8. Trespafs for breaking his house and the walls of the same, the defendant to the breaking of the house pleaded not guilty, and to the walls justified. And by the opinion of the Court he shall not have both these pleas ; for one is repugnant to the other ; for by the justification he confesses himself guilty, though it be excusable, and the house and the walls are all one, and he cannot plead not guilty, and justify to one and the same thing. Br. Bar, pl. 51. cites 21 H. 7. 21.

[538] 9. S. brought trespafs against C. for divers things ; as to part the defendant pleaded that it was in default of inclosure by the plaintiff, and as to the residue not guilty ; and issue thereupon. But before the trial, the plaintiff confessed the bar, and *no prosequi ulterius* entered, and after the issue is found for the plaintiff ; and well. For the defendant had relinquished that part without benefit of the bar ; and for that had pleaded not guilty. So, by Popham, if it had been for a trespafs in two several acres, and the defendant justifies in one, and as to the other pleads not guilty ; the plaintiff may confess part, and have issue and verdict for the other. And judgment in our case for the plaintiff. Noy, 42, 43. Stephen v. Carter.

Sty. 72.
S. C. but
S. P. as to
the manner
of pleading,
does not ap-
pear.

10. In trespafs of breaking a house and close, the defendant pleaded that he by compulsion, and for fear of his life, entered the said house, and returned immediately through the said close, which is the same trespafs, &c. The plea was held ill, as well for the matter as the manner, because he did not shew that the way to the house was through the said close. All. 35. Mich. 23 Car. B. R. Gilbert v. Stone.

11. In trespafs, the plaintiff declared of chasing and taking his cattle, and carrying away three heifers of the plaintiff ; the defendant justified the taking and carrying away three heifers of one P. another defendant, by virtue of a warrant from the sheriff in replevin, &c.

&c. The Court took exception that this was *no answer to the declaration*. And the reporter says, that this without question was a fatal exception; for he ought to have pleaded not guilty to the taking and carrying away the plaintiff's beasts. 2 Lutw. 1372. Hill. 3 & 4 Jac. 2. Dale v. Philipson & al'.

12. In trespass for breaking his close and *digging stones*; the defendant *prescribed* to enter and dig stones *for the reparation of his house, and fences*, by which he dug and took them *for repairs*, but does not say that he used them, which he should, or at least should say *penes se retinet ad reparand'*; and so judgment was given for the plaintiff. 3 Lev. 323. 3 W. & M. in C.B. Danby v. Hodgson. 2 Lutw. 1387. S. C.

13. In *trespass of assault, battery, wounding and imprisoning*, &c. The defendant, as to the force and wounding, pleads not guilty, and *quoad residuum transgressionis, insultus & imprisonamenti* he justifies as bailiff by virtue of an execution. It was objected that the plea was ill, because in the quoad residuum he had omitted the battery, and said only quoad residuum transgress' insult' & imprisonamenti; so that the not answering the battery was a discontinuance of the whole. The Court agreed that quoad residuum had been sufficient, but when in the quoad he enumerates all the other particulars, omitting the battery, by this the battery is excluded in the quoad residuum; but upon citing the case of *the KING v. NEWTON, Curia advisare vult. But the plaintiff being afterwards satisfied that the exception would not aid him, he † to prevent the judgment of the Court against him, discontinued. 3 Lev. 403. Mich. 6 W. & M. in C.B. Patrick v. Johnson. *2 Lev. 111. Trin. 26 Car. 2. B.R. S.C. which was an indictment of trespass, forgery, and publication; and the jury found the trespass and forgery, but omitted the publication. The Court held, that the finding him guilty de transgressionibus

prædicta, included it; as in trespass of assault and battery, the jury found defendant guilty of the trespass and assault. The Court said it had been adjudged that this includes the battery.

† This is denied by Serjeant Lutwich. 2 Lutw. 929. S. C.

14. In trespass of taking goods, the defendants *justified under a precept to the bailiffs of the borough, delivered to the defendants, then bailiffs of the court*, to be executed; but judgment was given for the plaintiff, because *they aver* that they were bailiffs of the court and officers, but not that they were bailiffs of the borough; and if they were not, then, though they might be bailiffs and officers of the court, yet the precept was not directed to them, and so could not execute it or justify under it; for there might be both bailiffs of the borough, and bailiffs of the court too, and they might be distinct officers. 2 Ld. Raym. Rep. 1530. Trin. 2 Geo. 2. Watkins v. West. [539]

(Q. a. 8) Pleadings. How. *Where there is a Disseisin and Re-entry.*

1. **I**N trespass, the defendant said that he was *seised till by D. disseised, which D. was seised till by the plaintiff disseised, upon whom the defendant entered at the time of the trespass*; which was adjudged a good plea. Br. Trespas, pl. 320. cites 10 E. 4. 6.

2. Trespas quare clausum fregit, &c. and the defendant said that it was the franktenement of A. and he by his command entered and did the trespass; the plaintiff said that he himself was seised till by the defendant and the said A. disseised to the use of A. and the plaintiff re-entered, and the trespass mesne, &c. And per Cur. this had been no plea, unless the plaintiff had made the defendant privy to the tort; for he who does a trespass after the disseisin shall not be punished by the first disseisee. Br. Trespas, pl. 348. cites 20 E. 4. 18.

But if he had said that he himself was seised till by D. disseised, who infeoffed the plaintiff, upon whom the defendant re-entered; this had been a good plea; per Brian. Br. Trespas, pl. 274. cites 5 H. 7. 11.

3. It is no plea in trespass that A. was seised till by D. disseised, who infeoffed the plaintiff, upon whom the said A. re-entered, whose estate the defendant has, because the estate of the defendant is not immediate upon the estate and the possession of the plaintiff; per Brian. Br. Trespas, pl. 274. 5 H. 7. 11.

4. And in trespass it is a good plea that the plaintiff disseised the defendant, upon whom he entered; but it is no plea in assise, for it amounts but to nul tort; per Brian. But Vavisor held all one, immediate entry or not, and no diversity between trespass and assise. Nevertheless all the King's Bench held with Brian. Br. Trespas, pl. 274. cites 5 H. 7. 11.

5. In trespass, the defendant justified in 40 acres for common appendant; the plaintiff said to 20 acres that they were parcel of his waste, and he approved them, saving to the tenants sufficient common, and the defendant entered after the approvement and did the trespass; and to the other 20 acres, he said, that he was seised and disseised by the defendant, and re-entered; and the trespass, mesne, &c. Note good pleading. Br. Trespas, pl. 423. cites 10 H. 7. 14.

(R. a) Bars of a Trespas.

S. P. of grass spoiled. Br. Trespas, pl. 195. cites 39 E. 3. 20.

[1.] If monies are paid in satisfaction of trespass, it is a good bar. 12 H. 4. 8. b.]

* [540]
So of putting mud and or-
† Fol. 570.

[2. If a trespass be done to the lord of a leet, for which he is amerced in the leet, which is not lawful, if the amercement be levied * and † received, this shall be a bar of the trespass. 12 H. 4. 8. b. 39 E. 3. 20. b. adjudged.]

due to the walls of his house; for though the amerciament is not lawful for trespass to the lord himself, but only of common nulance, yet as it is paid, it is a satisfaction and good bar in trespass. Br. Trespas, pl. 100. cites 12 H. 4. 8. — Br. Replication, pl. 13. cites S. C.

So in trespass, the defendant said that the defendant was amerced for the same trespass in the court of the plaintiff, and offered to 10d. which the plaintiff had levied; judgment, &c. And the plaintiff said that he did another trespass the e. prift; and the others e contra. And so see that a recompence is admitted for a bar and satisfaction. Br. Trespas, pl. 61. cites 47 E. 3. 19.

So where the defendant said that he was amerced, which was offered to 2s. of which he had made gree to the lord; and held a good plea by the acceptance of it, though the amerciament in the court baron be extortion; quod nota. Br. Trespas, pl. 66. cites 48 E. 3. 8. — S. P. Ibid. 234. cites 22 Aff. 51.

[3. So

[3. So if he had held court in his chamber, and amerced him, and levied it, this shall be bar of trespass (for he has a satisfaction.) 12 H. 4. 8. b.]

[4. A *nonfuit* in an appeal of *maibem*, is not any bar in action of trespass of the same battery. Contra 43 Aff. 39.]

[5. If a man *recovers* in an appeal of *maibem*, this shall not be any bar in trespass for the battery. 22 Aff. 82. by Thorpe.] But a recovery in trespass for assault and battery, and execution had, is a good bar in appeal of *maibem* against the same person upon the same matter; per Ayliff J. Le. 13. cites Cobham's case.

6. Trespass of beasts taken brought in B. R. it is a good plea that the plaintiff has *replevin* pending of the same taking in C. B. to which the plaintiff has appeared, judgment of the writ; quod nota. Br. Trespass, pl. 257. cites 40 Aff. 31. So in trespass of a horse taken brought in C. B. the defendant

said that the plaintiff has *replevin* pending in B. R. of the same taking; and a good plea per tot. Cur. Br. Trespass, pl. 171. cites 14 H. 7. 12, 13. — S. P. per Newton Ch. J. Br. Trespass, pl. 152. cites 22 H. 6. 15. — Same cases cited 5 Rep. 61. b. in Sparrie's case.

So of writ of *detinue* pending of the same beasts; for these affirm property in the plaintiff; per Newton Ch. J. Br. Trespass, pl. 152. cites 22 H. 6. 15.

Contrary, to say that the plaintiff has another writ of trespass pending of the same taking; per Newton Ch. J. Note the diversity. Br. Trespass, pl. 152. cites 22 H. 6. 15.

7. Trespass of a horse taken. The defendant said that he had a leet in D. and J. N. was amerced there for *purpresture*, by which he was amerced to 10s. by which he distrained the horse of J. N. for the amercement, and the issue was taken if the horse belonged to the plaintiff at the time of the taking, or to J. N. Brooke makes a quære of this pleading at this day. Br. Trespass, pl. 59. cites 47 E. 3. 12. Br. Issues Joines, pl. 46. cites S. C.

8. Trespass by a prior of trees cut, and franktenement broken, and servants beaten; the defendant pleaded *arbitrement*, which by protestation he is ready to perform, & pro placito that the trespass was in the time of his predecessor; to which the plaintiff taking the *arbitrement* by protestation said for plea that the trespass was in his own time, prist, and the others *e contra*; and this plea was pleaded to the writ. Br. Trespass, pl. 69. cites 2 H. 4. 4.

9. Trespass in bank of goods carried away; the defendant said that the plaintiff sued plaint of the same trespass in the county, and had deliverance, and a good plea; for by this action he is to recover the value, &c. which ought not to be where he has received the goods. Br. Trespass, pl. 82. cites 7 H. 4. 15.

10. In trespass the defendant said that he himself was seized till by one A. disseised, who infeoffed the plaintiff upon whom the defendant entered, of which entry the plaintiff has brought his action, and admitted clearly for a good bar, and all the argument was upon the replication of the plaintiff. Br. Trespass, pl. 17. cites 9 H. 6. 32. But it is no plea that the defendant was seized till by the plaintiff disseised upon whom he entered. And

the same law in assise as it was said for law. And the reason seems to be inasmuch as it amounts to the general issue, and then he may give the matter in evidence. Br. Trespass, pl. 24. cites 27 H. 6. 3.

11. Trespass against J. N. who said that at another time the plaintiff brought trespass of the same goods against him and T. N. [who] appeared, [541]

appeared, and the plaintiff recovered against him, which T. N. is in full life not named, judgment of the writ; and the best opinion was, that it is a good plea, without saying that he had execution; for recovery without execution, if it was against this same J. N. is a good bar in trespass. Br. Trespafs, pl. 20. cites 20 H. 6. 11. and 40 E. 3. 27. 39.

12. Trespafs of *trees cut and carried away*. The defendant to the trees pleaded gift of the plaintiff before the trespass, by which he took them, &c. and to the cutting not guilty. Littleton said not guilty of the cutting goes to all. But Prisot said no, he shall have both; for he may be found guilty of the one, and acquitted of the other. And the same law that gift is a good plea. 42 E. 3. 23. Br. Trespafs, pl. 27. cites 33 H. 6. 12.

13. It is a good plea in trespass, *that the plaintiff was seised, and leased to him for years, by which he entered and cut the trees, and yet it is waste, but trespass does not lie; per Moyle Just.* Br. Trespafs, pl. 291. cites 5 E. 4. 64.

14. Trespafs. The defendant pleaded lease to him for life made by the plaintiff; per Wood, this is no plea, no more than in assise. But Brian and Vavisor contra; for the lessor has colour by the reversion to enter and see the waste. Br. Trespafs, pl. 280. cites 6 H. 7. 14.

Jo. 147. pl. 6. Mich. 2 Car. B. R. the S. C. and the said justices held accordingly. — Lat. 144. S. C. accordingly. — But all the books agree that

15. In trespass of *breaking his house, and carrying away 3000 l. in bags*, the defendant pleaded that he and one A. were indicted by procurement of the plaintiff for the same offence, and that A. was found guilty as principal, and the defendant as accessory, and had his clergy, judgment si actio, &c. Jones J. thought the action would not lie, because being found felony, the party shall not be admitted now to make it trespass; but Doderidge and Whitlock J. e contra, because an indictment is at the king's suit; but otherwise had it been by appeal. Noy, 82. Markham v. Cobb.

judgment was unanimously given for the plaintiff upon the defect of the plea, by not shewing that the plaintiff gave evidence; for otherwise he shall not have restitution, and the alleging his procurement is not sufficient.

2 Keb. 69.

pl. 44. WESTLAKE v. PEARLE, S. C. that it is ill without pleading a special accord; and judgment for the plaintiff nisi.

16. Trespafs for *riding his horse*; the defendant pleaded that *postea*, viz. such a day, the plaintiff *exoneravit eum* of the said trespass. Upon demurrer it was held no plea, and judgment for the plaintiff; and it seems it cannot be a plea in trespass in any case, though it may in assumpsit before breach of the promise. Sid. 293. pl. 12. Trin. 18 Car. 2. B. R. Westlake v. Perve.

12 Mod. 658.

S. C. adjudged accordingly, and there, pag. 664. Holt Ch. J. said, if he had shewn that

17. Where a *distress escapes*, the distrainer cannot bring trespass unless it be shewn to be wholly *absque defectu suo*; (for *absque assensu suo* is not sufficient;) but if the distress had died, the action revives, because it was by the act of God. Adjudged by 3 J. contra Gould J. 1 Salk. 248. pl. 3. Pasch. 12 W. 3. B. R. Vasper v. Eddowes.

the defendant had taken it out of the pound, it might be somewhat, or even that it escaped out of the pound, and ran home to the defendant, and that he came upon fresh pursuit, to take it, and had been hindered by the defendant. — Id. Raym. Rep. 719. Hill. 13 W. 3. S. C. adjudged accordingly.

— [And

——— [And it seems by all the books that the pig was lost, and that the defendant never had it afterwards, so as if judgment should have been given against him, he would have been punished doubly, as was observed in the reports, and which it is said there, would have been very hard.]

18. It was agreed, that if a *distress* is *taken damage-feasant*, it is a good bar in trespass so long as it is detained. 12 Mod. 663, 1 Salk. 248. pl. 3. S. C. and S. P. in case of *Vasper v. Edwards*.

(S. a) Trespass. Bar. What shall be a good Bar of Trespass. [Tender.] [542]
See tit. Tender (M) and (S).

[1.] IN an action of trespass for a negligent escape, as where *beasts escape into my land*, it is a good plea in bar that he *tendered to me sufficient amends before the action brought*. Tr. 9 Ja. SIR G. WALGRAVE'S CASE, by Popham and Williams.]

[2. But in an action of trespass for a *voluntary trespass*, as for *putting in my beasts into his land, or breaking his hedges*, it is not any plea, that I tendered to him sufficient amends before the action brought. Tr. 3 Ja. B. R. Sir G. WALGRAVE'S CASE, by Popham and Williams. P. 7 Ja. B. HAWTON'S CASE, per Curiam.] 3 Lev. 37. *Bafely v. Clarkson*, S. P. ——— Trespass of a close broken, and
grafs spoiled. The defendant said, that the trespass did not exceed 10s. and he tendered to him sufficient amends; and was held no plea, but a void tender. Contrary in *avowry* for damage feasant, elsewhere. Br. Trespass, pl. 214. cites 21 H. 7. 30.

(T. a) Pleadings. *New Bar, &c.* In what Cases the Defendant may plead a new Bar.

1.] IN *trespass in D.* the defendant said, that the place is an acre, and pleaded in bar. And the plaintiff said that it is 4 acres otherwise than in the bar; and inasmuch as he did not answer to the trespass in this, judgment, &c. the defendant may plead a new bar to this. Br. Trespass, pl. 359. cites 21 E. 4. 75, 76.

2. And in *assise of rent*, the tenant pleads *hors de son fee*. The plaintiff makes title to the rent, the tenant may plead in bar of this title; per Vavisor. And all the justices said, that it is clear that he shall have a new bar in those cases. Br. Trespass, pl. 359. cites 21 E. 4. 75, 76.

3. And where the defendant justified by licence to enter into his house, and the plaintiff said, that the defendant entered the same day, and came back, and after the same day entered and broke his door and windows, of which trespass the action is brought. And to this the defendant pleaded not guilty. But per Catesby J. in such case the defendant shall not be compelled to plead not guilty, but may make bar or justify; for now it is as if it had been comprised in the count. But per Brian Ch. J. he shall plead not guilty. Br. Trespass, pl. 359. cites 21 E. 4. 75, 76.

4. And where the matter in the declaration, and in the replication, is of one and the same nature, the defendant shall take the general traverse; and of killing of distress, he shall say that he did not kill; per Choke. Br. Trespass, pl. 359. cites 21 E. 4. 75, 76.

(U. a) Pleadings by *Que Estate*. Good or not.

1. **I**N trespass the defendant justified the taking as distress in the hundred by the default of plaintiff, who was decener, because he and all his predecessors, and all those *que estate* he has, have been seised of the hundred, &c. time out of mind. And per Hill, clearly he cannot prescribe by *que estate* without shewing deed thereof; and Hull accordingly, in action upon the case, 1 H. 4. 7. Br. *Que Estate*, pl. 9. cites 11 H. 4. 89.

2. In trespass the defendant made title by assignment of dower to E. S. *que estate* the said E. has, which E. is yet in full life. And so it seems that he who conveys by *que estate* of him who has but a particular estate, ought to aver the life of the particular tail, by which, &c. Br. *Que Estate*, pl. 46. cites 10 H. 6. 1.

3. In trespass upon the statute 5 R. 2. the defendant said, that W. was seised in fee, and infeoffed N. in fee, *que estate* he has, and gave colour, &c. and a good bar by *que estate*, without shewing how he has his estate, and this in this action, and the like in *præcipe quod reddat*. Br. *Que Estate*, pl. 32. cites 4 E. 4. 15.

Br. Traverse
per, &c. pl.
240. cites
S. C.

4. In trespass of spoiling his grass, and breaking his close, Catt. said the place where, &c. is 120 acres of land, &c. and his father brought assise of common, and recovered against J. then tertenant, by which he used the common at the time of the trespass, &c. *Que estate* in the land the plaintiff had at the time of the trespass. Jenney said, that W. was seised, and infeoffed us, by which we were seised till the trespass, *absque hoc* that he has the estate of J. against whom the recovery was. And the others *e contra*; and a good issue, per Littleton; for now the plaintiff claiming by J. shall be estopped, as J. himself should be. Br. *Que Estate*, pl. 35. cites 12 E. 4. 5.

5. In trespass the defendant said, that J. N. was seised in fee, *que estate* he has, and gave colour; and by the opinion of the Court a good plea. Brooke says *quod mirum*! for he ought to say that A. was seised, &c. and infeoffed J. N. in fee, *que estate* he has, or the like. But the plaintiff demurred as above, and the defendant durst not stand to his plea, but pleaded another plea; and the same term a *que estate* was traversed, and issue joined upon it; *quod nota*, Br. *Que Estate*, pl. 43. cites 9 H. 7. 14.

6. In trespass it is no plea, that A. was seised in fee, and infeoffed B. *que estate* C. has, who infeoffed the defendant; for the *que estate* shall be allowed in the defendant, and not in any who is in the *mesne conveyance*; *quod nota*. Br. *Que Estate*, pl. 49. cites 1 E. 6.

(U. a. 2) Pleadings. *Regress*. In what Cases a *Regress* must be shewn.

1. **T**HERE is a diversity where the defendant pleads his frank-tenement, and where he says, that J. S. was seised in fee, and infeoffed him, and gives colour to the plaintiff by J. S. There
it

it is a good plea for the plaintiff, that he was seised till by the defendant disseised, absque hoc that J. S. infeoffed the defendant without shewing regrefs; for there is a diversity where the defendant makes title to himself in his bar, which is traversed by the plaintiff, and when not; per Ascough. Br. Trespafs, pl. 127. cites 19 H. 6. 23.

2. Where the defendant in his bar gives to the plaintiff a title, and destroys it, it is sufficient for the plaintiff to maintain the same title without regrefs; per Ascough. Br. Trespafs, pl. 127. cites 19 H. 6. 23.

As where the defendant makes bar by disseint as heir, and the plaintiff claims as heir where he is a bastard, &c. there it is sufficient for the plaintiff to say, that he is heir, and not bastard, without shewing regrefs; per Ascough. Br. Trespafs, pl. 127. cites 19 H. 6. 23.

3. And it is sufficient to destroy the title of the defendant without more; and when the title of the plaintiff may stand with the bar, there it is sufficient for the plaintiff, without shewing regrefs, to traverse the title of the defendant; per Newton. Br. Trespafs, pl. 127. cites 19 H. 6. 23.

As in trespass the defendant says, that J. N. was seised in fee, and infeoffed him, and gives colour to the plaintiff by J. N. by which he entered, and the defendant re-entered, and did the trespass, &c. Now it may be that he entered, and yet no disseisin to the plaintiff; for it may be that both were upon the land together, and then this is no ouster nor disseisin to the plaintiff; and there it is sufficient to say, that the defendant had nothing of the flossment of the stranger; per Newton. Br. Trespafs, pl. 127. cites 19 H. 6. 23.

4. In trespass, if the defendant pleads, that it is his franktenement, the plaintiff may say that he was seised, and disseised by the defendant, without alleging regrefs in the land, house, or close. Contrary of trees cut, &c. there regrefs shall be alleged, which is traversable; per Prisot. Br. Trespafs, pl. 417. cites 37 H. 6. 35.

5. After disseisin or tortious ouster the party cannot have trespass before that he makes regrefs, and there in trespass of the trespass mesne the regrefs is traversable. Br. Trespafs, pl. 322. cites 11 E. 4. 3.

Br. Trespafs, pl. 238. cites S. C. — S. P. Br. Estates, pl. 46. cites 22 E. 4. 38.

6. Trespass does not lie against disseisor before regrefs. Br. Estates, pl. 46. cites 22 E. 4. 38. per Husley Ch. J.

If a man disseises me, I may have trespass for the mesne profits, though I do not re-enter, but in pleading I ought to allege re-entry; but this shall not be traversed, quod nota per Pigot, and none denied it. Br. Traverse per, &c. pl. 131. cites 9 E. 4. 38. at the end there.

7. Second deliverance; where a man leases for years upon condition, and after the condition is broken, the lessor shall not have action of trespass before that he has entered again, per Brudnell. Br. Trespafs, pl. 169. cites 14 H. 8. 23.

So where the lease is determined, trespass does not lie without re-entry, and this of land and things local, but contrary of things transitory; for there a man shall be in possession without entry or seizure; per Brudnell. Br. Trespafs, pl. 169. cites 14 H. 8. 23.

(U. a. 3) *Plea in Abatement. What is a good Plea in Abatement.*

1. **T**RESPASS in C. near S. it is no plea that C. is a hamlet of S. And so see that action of trespass may be brought in a hamlet. Br. Trespafs, pl. 371. cites 29 Aff. 33.

2. Trespafs of cattle taken in C. vi & armis, the defendant said that the plaintiff himself had brought replevin of the same taking in N. which is a hamlet of C. returned at this day, to which writ he has counted, and by this writ he does not suppose the taking to be vi & armis; judgment of this writ vi & armis; and a good plea, by which the plaintiff averred that the replevin was sued of another taking. Br. Trespafs, pl. 115. cites 38 E. 3. 35.

3. Trespafs against three, the one said that the two were dead before the writ purchased; judgment of the writ; et non allocatur, but against the two. And so see that the death of some shall not abate the writ against all, but mirum as here before the writ purchased; for then it is false, &c. But death pending the writ, shall not abate all the writ. And after the other said that the two bought the wood of the plaintiff to the use of the king; and this defendant came to measure the wood, &c. And issue tendered upon the bargain. Br. Trespafs, pl. 60. cites 47 E. 3. 18.

4. In trespass, the defendant said that before the trespass the plaintiff leased to J. N. which term yet continues; judgment. This is no plea, per Caund. without privity of the lessee. Br. Trespafs, pl. 62. cites 47 E. 3. 19.

5. Trespafs of cattle taken generally. Paston prayed judgment of the writ, for the plaintiff himself is possessed of the cattle, by which he ought to have had writ quod cepit & detinuit per tantum tempus per quod proficuum, &c. amisit. To this Bab. bid him to answer, quod nota. Br. Trespafs, pl. 221. cites 1 H. 6. 7. — And cites M. 11. H. 4. the like matter in trespass; and said there that the defendant in this case is not at any mischief; for he may give it in evidence to diminish the damages; quod nota. Br. Trespafs, pl. 221.

6. Trespafs in C. it is no plea to the writ that the place where, &c. is in K. and not in C. Br. Trespafs, pl. 176. cites 4 H. 6. 13.

Trespafs in D. the defendant said that there are in the same county D. over and D.

7. Trespafs in D. it is no plea to the writ that there are two D.'s and none without addition; for it suffices if he be guilty in one. Br. Trespafs, pl. 14. cites 9 H. 6. 5. But per Babb. by 9 H. 6. 29. * Nul tiel vill as D. &c. Judgment of the writ is a good plea, and 6 H. 7. 3. is accordingly ibid.

netber, and none without addition, absque hoc that there is any vill, hamlet, or lieu comus out of vill or hamlet called D. only in the same county. And a good plea for the visne by the reporter. Br. Trespafs, pl. 299. cites 2 E. 4. 10.

* S. P. Br. Trespafs, pl. 19. cites 9 H. 6. 62.

8. In trespass, it is no plea that the vill is in another county; but shall say that nul tiel vill in this county; nota. Br. Trespafs, pl. 19. cites 9 H. 6. 62.

9. It

9. It is no plea in trespass that the trespass was done by the defendant and another who is alive, not named, &c. Br. Trespass, pl. 20. cites 20 H. 6. 11. & 40 E. 3. 27. 39.

10. Trespass of entering into his house and breaking his close; Danby said, the house and the close are all one and the same place, and not diverse, judgment of the writ; but per Ascough and Porting. then you may plead not guilty to the one, and justify to the other; and therefore it was awarded no plea to the writ. And yet in præcipe quod reddat it is a good plea; note the diversity. [546]
Br. Trespass, pl. 151. cites 22 H. 6. 7.

11. Trespass de clauso fracto by B. and C. the defendant said that the place is 20 acres of which D. and the plaintiff are possessed in common, and shewed how, judgment si actio; and against C. he said not guilty. The Court held that he could not justify against the one, but that this is a justification against both, and he cannot be guilty against the one but against both, for it is a joint-action; but per Moyle he may plead to the writ against the one who has nothing in the soil, as to say that the soil is to the one only, and justify absque hoc that the other on the day of the writ purchased had any thing in the soil, as in replevin by two, he may say that the property is in the one, absque hoc that the other has any thing; judgment of the writ; quære, for after he pleaded not guilty against both. Br. Trespass, pl. 300. cites 2 E. 4. 22.

12. Trespass of breaking his close in O. and H. Young demanded judgment of the writ, for H. is a hamlet of O. and was, &c. And per tot Cur. it is no plea in trespass. Contra in præcipe quod reddat, and yet the mischief of the visne was mentioned, & non allocatur, but the defendant awarded to answer. Br. Brief, pl. 363. cites 7 E. 4. 18.

13. Trespass was brought by the baron and feme of battery of them. The defendant pleaded not guilty, and the damages taxed for the baron 10 l. and for the feme 40 s. And because the feme cannot join with her baron for battery of the baron, therefore for this part the writ was abated; and for the battery of the feme they recovered, for of this they may join in action. Br. Trespass, pl. 190. cites 9 E. 4. 51.

14. Trespass of trees cut, and land depastured in K. Norton said there is no such vill as K. without addition in the same county, prift; and the plaintiff was compelled to answer to it by reason of the visne; quod nota. Br. Trespass, pl. 94. cites 11 E. 4. 61.

15. Trespass by baron and feme of close broken and grass spoiled, the defendant said that A. was seised in fee, and had issue the feme of the plaintiff and the feme of the defendant, and died, and the daughters entered, and the one married the plaintiff and the other the defendant, and so the defendant and his feme held in common with the plaintiffs; judgment si actio; quod nota, by which the other made sole title. Br. Trespass, pl. 163. cites 15 E. 4. 2.

(U. a. 4) Pleadings. Where there is a *new Assignment*.

1. **TRESPASS** of a close broken and grass spoiled in D. Chaunt. said the place is a carve of land called A. in which the defendant and those que estate he has have held in common with the plaintiff, and those que estate he has time out of mind, and held in common the day of the writ purchased, by which he entered, &c. and a good plea per tot. Cur. by which the plaintiff assigned the trespass in this land and another, and that of this land he was sole seised, absque hoc that the defendant held in common, and the others e contra; and as to the trespass in the rest, not guilty. Br. Trespas, pl. 122. cites 8 H. 6. 16.

[547] 2. In trespass in one acre of land in D. the defendant pleaded the lease of the plaintiff of the same acre, by which he did the trespass, &c. To which the plaintiff said that he was seised of 2 acres, and made a lease of the other acre. And the best opinion was, that it is no plea, but shall say that he did not lease the acre in which the trespass was done, &c. But per Paston, he may say that he leased one acre, and the defendant entered and did the trespass in the one and the other, absque hoc that he leased the acre in which he supposes the trespass. Br. Traverse per, &c. pl. 15. cites 9 H. 6. 64.

* Moyle said that the defendant is at large to plead at large such matter as he has done here. 37 H. 6. 37. a. pl. 26.

3. Trespass for breaking his close, and digging and spoiling his land with carts and ploughs. Defendant said the place where, &c. is 3 acres, and that he and all those whose estate he has in such a house, have had a way there time out of mind to 12 acres, &c. with carts and plows to carry and re-carry, and that he at the time of the trespass, &c. came with his carts and plows, &c. plaintiff replied, that besides the said way the defendant had broke his close in another place, and that defendant answered nothing to that; whereupon defendant justified in this place also for another way, as above, &c. Per Moyle and Prisot, this is good; for as well as the plaintiff may assign the trespass in a new place, and the defendant shall have a new answer, so where he assigns it in another place in the same land, as here the * defendant cannot justify for both together; for a man may have two ways in one and the same land, and common in the same land and estovers, and digging of turves, or of clay, and he cannot allege all those at the commencement, but one only; but if he has way through all the land, there it ought to be alleged accordingly at the commencement. Contrary where he has a way in the one end only, and another interest in another parcel, there he may be a trespassor in another parcel of the same land; quod Cur. concessit. And per Prisot, the plaintiff in his new assignment ought to allege in what other part of the same land the defendant has done the trespass; and the defendant in his justification shall shew in what place of the land, viz. in the east end or west end, &c. and the plaintiff in his new assignment shall shew how that the defendant did the trespass in the south part or north part of the same land, so that a distinction may appear between them; and by him,

him, where the plaintiff assigns the trespass in other land, the plaintiff ought to give it a name, and if he assigns it in the same land where the defendant has justified, he ought to give such special notice that the difference may be perceived; by which the plaintiff amended his replication according to the opinion of Prisot; quod nota bene. Br. Trespass, pl. 203. cites 37 H. 6. 36.

4. Trespass *ubi ingressus non datur per legem*; the plaintiff after bar pleaded by the defendant shall not assign the trespass in a new place, because the writ comprehends certainty, viz. *quod ingressus est in 4 acres of land and 8 acres of meadow, &c.* Br. Trespass, pl. 224. cites 38 H. 6. 7.

S. P. Per Cur. Br. Trespass, pl. 284. cites 9 H. 7. 6.—
Contra in general writ of

trespass; for there is no such certainty in the writ; per Moyle and Choke. But per Prisot, it is no good plea in *trespass* upon the 8 H. 6. and therefore it seems the like in this action, and after the averment was received, and the plaintiff maintained his writ. Br. Trespass, pl. 224. cites 38 H. 6. 7.—
S. P. per tot. Cur. Br. Trespass, pl. 284. cites 9 H. 7. 6.

5. Trespass of a close broken, and 20 stacks of corn taken and carried away, the defendant said that the place is 5 acres called *White Acre*, and justified there for damage feasant. The plaintiff said that the place is 3 acres called *O.* whereof he was seised in fee, and there was possessed of the stacks till the defendant took them, &c. And no plea, by which he said as above, *absque hoc* that they were damage feasant at the time, &c. in the 5 acres called *W.* prout, &c. Br. Traverse per, &c. pl. 193. cites 5 E. 4. 53.

6. In trespass, where the plaintiff in his count gives the place, where the trespass is supposed, a name, there the plaintiff shall not assign the trespass in a new place; per Choke, which none denied. Br. Trespass, pl. 422. cites 9 E. 4. 24.

Br. Deputy. pl. 11. cites S. C. Per Choke.

7. Trespass of breaking his close, and subverting his soil with his cart, and shewed how much of the land was subverted, as he ought, as it is said, viz. two acres of land. The defendant said that the place where, &c. is 2 acres of land called *E.* and pleaded in bar. Per Townsend, where the trespass is alleged in certainty, as here, the defendant shall not give the place a name, no more than in trespass upon 5 Rich. 2. or upon 8 H. 6. And the whole Court held contrary to him, that in this action he may plead, as above, and give name, notwithstanding the certainty in the count; for it may stand with his count, and it was not denied but that he shall do so in action upon 5 R. 2. or 8 H. 6. Br. Trespass, pl. 350. cites 21 E. 4. 18.

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8. Trespass of breaking his close, and subverting his soil, viz. 30 acres. The defendant pleaded feoffment of the manor of *D.* of which the place, &c. at the time of the trespass was parcel, and gave colour to the plaintiff; and the plaintiff said that the place where is a rod of land called *S.* other than the defendant has answered to; and because the defendant had not answered to it, he prayed his damages; to which the defendant pleaded not guilty, and found for the plaintiff to the damage, &c. And there the opinion of the Court was clear, that he shall not make another assignment when he has shewed it in his count, viz. 30 acres; to which the defendant has answered that this is parcel of the manor, &c. For the certainty appears;

And so see a diversity where the plaintiff in trespass counts in 30 acres, and the defendant makes bar that this is parcel of a manor; and where the defendant says that the

and

place is 30 acres, and that the plaintiff leased to him, &c. for there the plaintiff may assign the trespass in a new place. Br. Trespas, pl. 284. cites 9 H. 7. 6.

But where the plaintiff assigns the trespass in another place, the defendant may justify to it, or plead not guilty. Br. Trespas, pl. 168. cites 14 H. 8. 4. and 24.

9. In trespass, the defendant justified in a place called *Black-acre*; the plaintiff assigned the trespass in *White-acre*; the defendant said that the places are all * one and the same place. And per Cur. he shall not have it for a plea, but may plead the same justification to it. And per Brudnell, Pollard, and Brook, in this case the defendant may plead not guilty to this new assignment; for the plaintiff by this has confessed that he claims nothing in the place where the defendant justified, and so he shall be tricked upon the evidence; quod nota. Br. Trespas, pl. 168. cites 14 H. 8. 4. & 24.

But upon such an assignment the defendant cannot justify in another vill, absque hoc that he is guilty in the place supposed by the plaintiff; for this amounts to not guilty there. Br. Trespas, pl. 168. cites 14 H. 8. 24.

Hence it follows, that if the plaintiff counts the place certain at the commencement, the defendant shall not have this pleading as above. Br. Trespas, pl. 168. cites 14 H. 8. 24.

* S. P. and upon a demurrer it was adjudged without argument to be no plea; for it is repugnant to say they are both one, when the plaintiff by his replication has affirmed upon record that it is another; for when he says alius it cannot be idem; and so are 14 H. 8. 4. 27 H. 8. 7. And Walmley said it was so adjudged 28 Eliz. wherefore it was adjudged for the plaintiff. Cro. E. 355. pl. 13. Mich. 36 & 37 Eliz. in C. B. *Freeston v. Standford & al'*—Poph. 109. pl. 5. Mich. 38 & 39 Eliz. S. C. by name of FENNER's case, says it was adjudged for the plaintiff, because that in such a case upon a special assignment, it shall be taken merely another than that in which the defendant justifies, inasmuch as the plaintiff in such a case cannot maintain it upon his evidence given, if the defendant had pleaded not guilty to this new assignment, that the trespass was done in the place in which the defendant justifies, although it be known by the one and the other name, and that the plaintiff hath good title to it, because by his special assignment, saying it is another than that in which the defendant justifies, he shall never after say that it is the same in this plea; for it is quite contrary to his special assignment. And upon this a writ of error was brought in the King's Bench, and the judgment was there affirmed this term for the same reason; quod nota.—Cro. E. 492. pl. 10. S. C. by the name of FREESTON v. CROUCH accordingly, by Popham, Clench, and Fenner; and because the plaintiff is estopped to give evidence in that which the defendant hath pleaded, the defendant should have pleaded in bar to the place newly assigned, or have pleaded not guilty, according to 14 H. 8. 4. and 27 H. 8. 7. But Gawdy e contra, who held the law to be with 21 H. 6. 21. For it is not reasonable, that if they are all one place, but he may plead it, and not to stand upon an estoppel, and put it upon evidence to a jury; but because the other justices were of a contrary opinion, he assented that judgment be affirmed.—Mo. 460. pl. 641. S. C. by the name of COUCH v. FREESTONE, that where the plaintiff makes a new assignment the defendant ought to plead not guilty, and cannot aver that the place where, &c. is one and the same.

[549] 10. Trespas. The defendant justified in a place called *A.* which is his franktenement; the plaintiff assigned a new trespass in *B.* which is other place than *A.* and because the defendant did not answer to the trespass in *B.*, &c. the defendant said that *A.* and *B.* are one and the same place, and not diverse. And per Cur. this is no plea; for by the new assignment of the trespass the first bar is waived, and the defendant may plead not guilty to the trespass in *B.* and if the plaintiff gives evidence in *A.* the defendant may estop him by the first matter in the refusal of *A.* quod nota, and then the defendant pleaded other matter; and in assise if the defendant pleads hors de son fee, and the plaintiff makes title, the first bar is waived. Br. Trespas, pl. 3. cites 27 H. 8. 7.

11. In trespass for breaking his close, the defendant says the place where is 6 acres in *D.* which are his freehold, the plaintiff replied his

his franktenement, and not the franktenement of the defendant. If the plaintiff has 6 acres there, and the defendant has other 6 acres, the defendant cannot give in evidence that he did the trespass in his own 6 acres, but his plea shall be intended to relate to these 6 acres of the plaintiff, because till defendant gives a name to the place where the trespass was done, the plaintiff need not make any new assignment, since the defendant hath not varied the meaning of the plaintiff, as by saying that the place where, &c. is 6 acres called Greenmead, &c. D. 23. b. pl. 147. Mich. 28 H. 8. Anon.

12. If the plaintiff in trespass makes a new assignment, and gives a special name to the place, and also assigns boundaries on every part of the place, viz. east, west, north, and south, and names the boundaries, it was held by several that he ought to prove those to be true, as well as the name of the place, because every word, which is put in the new assignment to make the place plain and certain to the jury before the words alias quam in barra, is effectual, and the buttals are parcel of the new assignment; but quære, because the opinions are differing. D. 161. b. pl. 46. Trin. 4 & 5 P. & M. Saunders v. Lord Burgh.

13. In trespass quare clausum fregit, &c. the new assignment was (viz.) in one acre of land or meadow lying in a field in S. aforesaid called Northfield, &c. The defendant, as to the trespass de novo assignat in præd' acra terre, pleaded not guilty. But the jury was discharged, by the opinion of the Court, for the uncertainty in the new assignment, it being of land or meadow, and there being no buttals or name to the acre; and also the answer was to the acre of land only. And the plaintiff might have 2 acres, one land and the other meadow. D. 264. pl. 39. Trin. 9 Eliz. Anon.

And. 31. pl. 73. in the case of LEE v. MAYER, cites this case, and that the writ abated for this uncertainty. And adds, so note, that this new assign-

ment is as parcel of the declaration; otherwise could not be that the writ abate it, but rather ought to be a replender, and so to commence at the new assignment, which was not done for the reason aforesaid. — Bendl. 177. pl. 222. S. C. that the pleading was adjudged void of both parts.

14. Trespass of breaking his close and house. The defendant in his plea put the plaintiff to a new assignment, (viz.) an house called a stable, a barn, and another house called a cart-house, and granary. Per Gawdy J. the same is good enough; that the word domus in the declaration is nomen collectivum, and contains every thing mentioned in the new assignment, and so was the opinion of the whole Court. 2 Le. 184. pl. 230. Mich. 32 Eliz. B. R. Hore v. Wridlesworth.

4 Le. 15. pl. 56. 33 Eliz. S. C. in almost the very same words.

15. When in trespass the defendant pleads in bar, and the plaintiff makes a new assignment, it is reasonable that the defendant may answer to this new assigned wrong; for by 27 H. 8. after a new assignment the old bar is waived, and out of the book, and the defendant shall plead to the new assignment as if he had never pleaded before; per Gawdy J. To * which the other justices agreed. Goldsb. 191. pl. 128. Hill. 43 Eliz. in case of Bodyam v. Smith.

* [550] The declaration was of taking an ox in Dale. The defendant justified the taking in Bl. Acre, and that it wa. his freehold,

for damage feasant. The plaintiff made a new assignment, that the place where the taking was, was Wb. Acre in Dale; and the defendant justified for heriot service. Goldsb. 191. Bodyam v. Smith. — The Court were all clear of opinion, that the defendant might vary in his justification upon the new assignment, and so a judgment in C. B. was reversed, and this upon conference with

the justices of C. B. and great deliberation. Mo. 540. pl. 713. Mich. 35 & 36 Eliz. *Odham v. Smith*. —And. 298. pl. 306. S. C. but S. P. does not appear. —Cro. E. 589, 590. pl. 27. Mich. 39 & 40 Eliz. B. R. the S. C. And the Court held the pleading well enough; for by the new assignment the bar is out of doors, as if it never had been pleaded; and cited 27 H. 8. 7. And it may be that he took the ox in Bl. Acre, being his own land, for damage feasant, and another in Wh. Acre, as for the heriot, and so they may well stand together; and if the case be so, he could not have pleaded it otherwise. And judgment in C. B. was reversed. —Goldsb. 191. pl. 128. *Bodyam v. Smith*, S. C. accordingly.

S. C. cited by North Ch. J. who said that it has formerly been doubted whether a new assignment might be in a trespass for taking goods, till it was resolved in this case that it may, but that it is generally used in trespass quare clausum fregit. *Freem. Rep.* 238. pl. 250. Mich. 1677. *Cockley v. Pagrave*.

16. Trespass of taking his beasts at K. and chasing them, &c. The defendant justifies in such a close for damage feasant. The plaintiff replies, that the place where was another close, &c. Whereupon the defendant demurred, pretending that the plaintiff never made any new assignment, but where the writ is quare clausum fregit. But the Court held the contrary, wherefore it was adjudged for the plaintiff. Cro. J. 141. pl. 18. Mich. 4 Jac. B. R. *Batt v. Bradley*.

17. In an action of trespass, and a new assignment made, &c. the issue is found for the plaintiff, and the writ of enquiry of damages was general, without any mention of the new assignment. And yet it was ruled by the Court, that judgment shall be entered for the plaintiff, although that the clerks say in ordinary course it is otherwise; and with that judgment agreed the case of *PULLEN AND EASON*, H. 43 Eliz. B. R. Rot. 941. for the new assignment is not the declaration of the certainty of accompt. Noy 26. *Sendall v. Sendall*.

18. In trespass for taking and carrying away 100 loads of turf at L. the defendant pleaded, that the locus in quo, &c. (whereas there was no place alleged) was 2 acres called Bl. Acre in L. which was his freehold. The plaintiff replied, that the locus in quo, &c. was a piece containing 20 acres in L. alias quam, &c. The defendant rejoined, that quoad aliquam transgressionem in pradiis 20 acres, not guilty. After verdict for the plaintiff it was moved, that this was no issue, because there were neither 20 acres, or any place certain in the declaration. But adjudged for the plaintiff; for though it was not in the declaration, yet it was no departure, because both parties agreed that the trespass was done at L. so that the assigning a more particular place in L. stands with and reduces the declaration to a greater certainty, and supplies it; and so is helped by the statute of jeofails. Hob. 176. pl. 197. Hill. 14 Jac. *Plant v. Thorley*.

19. In trespass of his close broken, against J. and 2 others, the writ was general; but the declaration was of plowing half a rood, and in digging another half rood; and after in his new assignment shewed it to be a fission, containing by estimation an acre. And it was found for the plaintiff, and damages assessed to 20s. And now it was moved in arrest of judgment, because the new assignment is more large than the declaration; and the opinion of the Court was, that because this was but an action of trespass, where damages only is to be recovered, that this is very good; but otherwise it is, per chance

perchance if it had been in an ejectment. Win. 65: East. 21 Jac. C. B. Avis v. Gennie & al.

20. *Battery* was laid at D. The defendant *justified at S. in the same county, on aid, and the command of bailiffs, to prevent a rescue of goods taken by them in execution.* But the plea was held to be ill; for the bailiffs have authority throughout the whole county, and so the cause of justification in the same county not local; and therefore he *should have justified in the same place (being in the same county) where the plaintiff declared;* and if the place had been material, he should have traversed all other places in the same county. And judgment for the plaintiff. 3 Lev. 113. Mich. 35 Car. 2. C. B. Bridgwater v. Betheway.

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21. Trespas for taking his cattle in Newmore. The defendant *pleads that the place where was Stone-hill, and justifies that it is his franktenement.* The plaintiff *replies that there is a river runs through Newmore, and on the north-side of it is Stone-hill, but that he took the cattle on the south-side of the river; and concludes hoc paratus est verificare;* and because the defendant has not answered to the trespas in this place now assigned, demands judgment. The defendant demurs generally; and it was urged that this replication was not well concluded; for he ought to have stopped at hoc paratus est verificare, and not have demanded judgment for not answering the trespas now assigned, when it was impossible he should answer it before it was alleged. But per Curiam, this is but matter of form, and though not so formal, yet the defendant not having shewed it for cause, cannot take advantage of it, although it had been proper only to have averred it, or else he might have traversed, absque hoc that he took the cattle at Stone-hill. Freem. Rep. 238. pl. 250. Mich. 1677. Cockley v. Pgrave.

22. If a man brings trespas for taking his cattle in Black Acre on such a day, and the defendant *justifies the taking at another place damage feasant,* the plaintiff may make a novel assignment, if there were 2 takings. So if there were 2 batteries on one day, and the one were on the plaintiff's own assault, and the other not, if he will justify one de son assault demaine, he may make a new assignment of the other battery. Agreed per tot. Cur. 6 Mod. 120. Hill. 2 Ann. B. R. in case of Elwis v. Lombe.

(W. a) Pleadings. *Que est eadem Transgressio.*
Good or necessary in what Cases.

See Record
(N), pl. 19.

1. **TRESPASS.** The defendant said, that the land is 4 acres, of which he was seised in fee till by the plaintiff disseised, upon which he entered; which is the same entry of which the action is brought. And a good plea, per tot. Cur. because the action was of entry into the close of the plaintiff, and the defendant has averred that it is the same entry, for otherwise it is no plea; for if otherwise, then it seems that he shall say that it was his franktenement, &c. or make title and give colour, &c. Br. Trespas, pl. 357. cites 21 E. 4. 74.

2. Trespas

Jenk. 92. pl. 78. cites S. C. — So in trespass of goods carried away, if the defendant justifies the same day and place. Br. Trespas, pl. 219. cites 21 H. 7. 39.

2. Trespas of *breaking his close the 1st day of May*. The defendant pleaded licence of the plaintiff the same day, by which he entered. Judgment *fi actio*, and a good plea, without saying that it is the same trespass. Br. Trespas, pl. 219. cites 21 H. 7. 39.

So in trespass of battery, and he justifies the same day and place, it is good, without saying that it is the same trespass. Br. Trespas, pl. 219. cites 21 H. 7. 39.

But if he justifies at another day, or another place, then he ought to say, which is the same trespass, &c. And this per Constable, Serjeant, which was affirmed by all the Court for clear law. Br. Trespas, pl. 219. cites 21 H. 7. 39. — Jenk. 92. pl. 78. cites S. C. — S. C. cited by Williams J. Balst. 138. Trin. 9 Jac. in case of Vastenope v. Taylor.

[552] 3. Trespas for assault, battery, and wounding at D. in the county of Suff. 26 Sept. 21 Eliz. The defendant pleaded, that P. Earl of A. was seised of 60 acres of pasture called S. in Thetford in the said county, and let them to R. W. 28 Eliz. for 21 years; and that the plaintiff tempore quo clausum predict' fregit & cuniculos ipsius R. ibidem inventos cum retibus & aliis ingeniis capere voluit, for which the defendant, as servant to the said R. and by his commandment, molliter manus imposuit upon the plaintiff at T. in the said 60 acres, to hinder him from carrying away the said conies quæ est eadem, &c. Absque hoc that he is guilty de transgressione & insultu, &c. alibi vel alio modo in dict' com' Suff. prout, &c. & hoc, &c. And upon demurrer it was adjudged for the plaintiff. Cro. E. 242, 243. pl. 7. Trin. 33 Eliz. B. R. Barret v. Havesett.

4. Trespas for taking his cattle at D. and driving them to places unknown. The defendant pleaded, that S. was seised in fee of 12 acres in M. and that the cattle were there damage feasant, and he by the command of S. drove them to D. and thence to F. in the same county, where he impounded them, which is the same taking; absque hoc that cepit averia predict' apud D. Adjudged the plea was ill, for that the traverse is a departure from the first plea, and repugnant to the matter which induces it. And it was said there needed no traverse, because the matter of the justification is transitory, and not local; but it suffices that he justifies in another place. Cro. E. 667. pl. 21. Pasch. 41 Eliz. C. B. Sir Walter Sands v. Lane.

5. Trespas of assault and battery in London. The defendant pleaded, that the plaintiff entered into his house in Waltham, in the county of Essex, and he molliter manus imposuit upon him, to put him out of his house, quæ est eadem, &c. Absque hoc, that he is culpabilis extra Waltham. Upon demurrer it was moved, that this trespass being transitory, the place is not traversable; but if it was, yet he ought not to conclude his plea quæ est eadem, &c. But all the Court held the contrary; for the cause of the justification being local, viz. the maintaining of the possession of his house, he may well justify there, but not elsewhere, and he may traverse every other place; as where one justifies as constable, or by force of a warrant. And therefore Popham said, the difference is betwixt this case and the case of PATRIDGE, which was adjudged in this court, that where one justifies by reason of an assault in another county, and traverses the county in the declaration, that is not good; because the justification is personal and transitory, and might

might be alleged in any place as well as the battery. But where it is local, as here, it is otherwise, and the conclusion *quæ est eadem transgressio*, &c. is good enough; for it concludes, that it is the same cause of action, but with a traverse, as it ought to be of necessity. But if the averment *quæ est eadem transgressio* had been omitted, it had been good enough. Wherefore, upon the first argument, it was adjudged for the defendant. Cro. E. 705. pl. 27. Mich. 41 Eliz. in B. R. Peacock v. Peacock.

6. If a declaration be general, *quare clausum fregit*, and does not express what close, there the defendant may mention the trespass at another day, and put the plaintiff to a new assignment; but if he say *quare clausum vocat' Dale fregit*, &c. there the conclusion, *quæ est eadem transgressio*, will not help; per Hale Ch. J. 1 Mod. 89. p. 54. Mich. 22 Car. 2. B. R. Anon.

2 Keb. 860. pl. 14. Hill. 23 & 24 Car. 2. B. R.

MARSHAL v. DITCHEN, seems to be S. C.

and it was of

trespass of cutting trees: May; the defendant justified at another day *quæ est eadem transgressio*; but the Court held it ill, unless it was transitory only, but there should be a traverse *absque hoc* that he is guilty at the day in the declaration; for the plaintiff cannot reply that he did the trespass as supposed, because that would be infinite, and so ill on a general demurrer.

7. In trespass for breaking and entering his house on the 10 Novemb., &c. the defendant justified his entry 11 Nov. by process out of an inferior court, &c. *Quæ est eadem fractio & intrusio*, and traversed that he was guilty *aliter vel alio modo*; upon a special demurrer, it was resolved inter alia, that if trespass be alleged on 10 Nov. and the justification on 11 Nov. yet if there be an averment *quæ est eadem transgressio*, as here, the plea is good without the traverse; and that though the plea was sufficient in matter of substance, yet the adding the traverse (though merely surplusage) being specially shewn for cause of demurrer has made it ill. 2 Lutw. 1452. Hill. 9 W. 3. Hargrave v. Ward.

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(X. a) Pleadings. Giving a Name to the Place where the Trespass was done. In what Cases, and how. Sec(U. 2.4).

1. **TRESPASS** in W. of breaking his close and spoiling his grass; the defendant justified in T. *absque hoc* that he is guilty in W. modo & forma; the plaintiff said that T. is a hamlet of W. And per Newton and Markham, by this replication they are agreed that W. and T. are all one and the same vill, and then the justification remains not answered. Quære if the plaintiff shall answer to the justification in his replication; for it was not adjudged, but issue was taken that T. was a known place, prist, and the others e contra; and per Newton and Markham, it is not sufficient to say that T. is not a hamlet of W. but shall say that it is a hamlet of another vill, or vill by itself, or place known. Br. Replication, pl. 4. cites 20 H. 6. 28.

Trespass in D. the defendant justified in C. *absque hoc* that he is guilty in D. it is a good replication that C. is a hamlet of D. and to the plea pleaded by the manner, &c. and demurred, &c. For

now the plea amounts to a justification, and the traverse amounts to not guilty, which are repugnant. Br. Replication, pl. 56. (58.) cites 22 E. 4. 50.

2. In trespass, the plaintiff, in his count, gave the place a name certain, viz. *Greenclose*, and the defendant answered to a house only; Vol. XX. S f and Br. Trespass, pl. 164. cites 15 E. 4. 22

24. S. C. and per Brian and Littleton, this giving of the place a name is *surplusage*, and not traversable. Br. Nugaton, pl. 15. cites 15 E. 4. 24. And says, that the word green-clofe was struck out. Brooke says, quod nota, that the name of the place shall not compel the defendant to answer to it.

3. Trespas of breaking his clofe and subverting his soil, viz. 2 acres of land, &c. the defendant said, that the acres are called *White Acres*, and pleaded bar; and well per Brian and Choke justices; for the defendant may give name in his bar, though the plaintiff has not given name in his count, and if the defendant pleads in bar without giving name to the place, there the plaintiff in his replication may give name to the land where, &c. For otherwise, if the plaintiff have several acres in the same vill, and the defendant has justified in some, and in some not, he shall lose his justification; and when the plaintiff has given name in his replication, he may say that the trespass was done in this land named, &c. But in action upon the stat. of 5 Rich. 2. he shall not plead so by a name, for there the certainty of acres is comprised in the writ; contrary in trespass, quod Catesby concessit; but by him, where the plaintiff gives name in his count the defendant may vary from it; and so note the diversity. Br. Trespas, pl. 360. cites 21 E. 4. 80.

[554] 4. Trespas, the writ and the count were *quare clausum fregit*, viz. one acre of meadow, and half an acre of pasture; the defendant said that the place is called *B.* and was his franktenement, &c. Per Fairfax Justice, where he gives name in his writ you cannot vary from it, but contrary where the writ is *clausum fregit* generally, without shewing name or quantity, there he may vary, though he gives name in his count; but not where he gives name in his writ or in the writ and count: and per Hufsey Ch. J. where the writ is *quare clausum fregit* containing 20 acres or 10 acres, the defendant cannot say that the place, &c. contains 6 acres, &c. or more, by which he may plead by protestation that the place is named *B.* and pro placito that the place is his franktenement; and therefore he pleaded accordingly; quod nota. Br. Trespas, pl. 366. cites 22 E. [4.] 17.

5. In replevin of taking in *D.* the defendant justified in *C.* *absque hoc* that he took in *D.* The plaintiff said that the place is known by the one name and the other; and to the plea pleaded by the manner, no law puts him to answer, &c. Br. Replication, pl. 56. cites 1 H. 7. 21.

6. Action upon the statute of 8 H. 6. of entry into a house, and 20 acres of land with force, the defendant pleaded in bar and gave the acres a name, and was not suffered to give name any more than in assise or præcipe quod reddat, because the plaintiff has given certainty in his declaration; and so the defendant shall plead to it at his peril; as in writ of entry in nature of assise, he shall not give a name. Br. Pleadings, pl. 134. cites 5 H. 7. 28.

7. In trespass, the plaintiff supposes the trespass to be done in the breaking of his house and clofe in such a town: the defendant justifies in a house and clofe in the same town, and shews which, to put the plaintiff to his new assignment; to which the plaintiff replied that

that the house and close of which he complains is such a house, and gives it a special name, upon which the defendant demurs; and adjudged that the plaintiff take nothing by his writ; for albeit a house may have a curtilage which passes by the name of a messuage with the appurtenances, yet this shall not be in this case, for by the bar the plaintiff is bound to make a special demonstration in what messuage and what close he supposes the trespass to be done, as to say that the house has a curtilage, the which he broke, and it shall not be taken by intendment that the messuage had such a curtilage to it, if it be not specially named. Poph. 109. pl. 4. Mich. 38 & 39 Eliz. Anon.

8. Trespass of breaking his house and closes; the defendant pleaded that the house is called C. and one of the closes is Bl. Acre, and the other Wh. Acre, and that they are his freehold, and so justifies. The plaintiff replies that the trespass done was in C. and in Bl. Acre, which are his freehold, absque hoc that they are the freehold of the defendant; and that the trespass was done in another place containing 20 acres, alias quam Wh. Acre, &c. Upon demurrer, all the justices, præter Walmesley, held that in regard the defendant has hit some of the places wherein the plaintiff intended the trespass, and pleaded thereto; the plaintiff may well answer to that part, and the defendant shall have no other answer; as if the defendant had hit one place and had confessed the action therein, the plaintiff needed not make any answer thereto; and the defendant shall not wave his answer, and answer to all *de novo*. Wherefore it was adjudged for the plaintiff. Cro. E. 812. pl. 18. Hill. 43 Eliz. C. B. *Prettyman v. Lawrence*.

9. Trespass, &c. for immoderately beating, wounding, and chasing horses and beasts at R., &c. The defendant pleaded that the place where, &c. was called Speltriggs in R. and is his franktenement, and so justified for damage-feasant by gently chasing and striking them with a little stick doing no damage *quæ sunt eadem*, &c. The plaintiff replied, that *de injuria sua propria absque causa* the defendant graviter & immoderate percussit the horses, &c. It seems that upon demurrer, judgment was given for the defendant, because the words (*apud R. prædict*) were omitted in the replication. See 2 Lutw. 1394. and 1398. Trin. 4 W. & M. *Cundal v. Hodgson*.

(Y. a) Pleading Deed of the Ancestor.

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See (C. b)
pl. 3.

1. **I**N trespass, the defendant pleaded feoffment of the father of the plaintiff with warranty, whose heir, &c. made to the defendant; and no plea per Ashton, Newton, and Porting. by which he waived it, and pleaded the same plea with colour; to which no more was said. Br. Trespass, pl. 156. cites 22 H. 6. 42.

2. In trespass, the defendant said that place is 20 acres, and pleaded a release of all the right with warranty from the ancestor of the plaintiff, whose heir he is, made to J. N. tenant of the land whose estate he has, and relied upon the warranty. Per Suliard this is no plea, but if he had given colour it had been a good plea, but several con-

tra, and that it is no plea, unless *when the franktenement comes in debate and by way of conclusion*, it is then a good plea, and not as here; for the action stands indifferent, for it may be brought by tenant of fee-simple, fee-tail, for term of life or for years; and *this is a real bar*, which is no plea in an action merely personal; for it may be that the plaintiff is tenant for years, or by execution by elegit, statute merchant, or such like, and therefore no plea. Br. Trespas, pl. 361. cites 21 E. 4. 82.—And cites 22 E. 4. 4. by the opinion of the whole Court there, except Catesby, it is no plea; quod nota.

See (Q. 2. 6). (Z. a) *Title. In what Cases a Title must be shewn in the Count or after Pleadings.*

1. **I**F A. brings trespass against B. of goods carried away, and B. says that the property was in C. who made D. his executor, and died, and the ordinary sequestered, and committed the administration to A. and A. administered, and after D. proved the will and administered, judgment, &c. this is a good plea without making title to B. And the same in debt by executor, to say that the testator died outlawed without making title. Br. Trespas, pl. 347. cites 21 E. 4. 5. per Brian Ch J.

2. Where a man justifies in trespass for distress for rent, which he recovered of a stranger, issuing out of the same land, it is no good justification to plead the recovery only, but ought to shew title also; for if he has no title, the ter-tenant who is a stranger, is not bound by it; per Moyle and Billing. Br. Judgment, pl. 7. cites 35 H. 6. 10.—But see 39 H. 6. thereof; for by them avowry is in the possession, and seisin ought to be alleged and not the recovery

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Poph. 1, 2. S. C. adjudged accordingly; and Popham, who seems to differ from Clench and Gawdy, said he agreed that in trespass in some cases the plaintiff may traverse the bar, or part of it, without making

3. Trespas. The defendant justified that W. was seised in fee, and leased to him for years; that the plaintiff claiming by colour of a deed of feoffment, where nothing passed, entered, &c. The plaintiff replies by protestation, that W. was not seised in fee, pro placito, says quod non dimisit. And being found for the plaintiff, it was moved that the plaintiff has not made any title to himself in his replication. But all the justices held it good enough; for in this action a man need not make any title to himself; but otherwise in an assise or other real action; also by the defendant's plea, that the plaintiff entered by colour of a deed of feoffment, * he admits him to be tenant at will, which is not destroyed. And it was adjudged for the plaintiff. Cro. E. 288. pl. 4. Mich. 34 & 35 Eliz. in B. R. Justice Fenner v. Fisher.

any other title than what is acknowledged to the plaintiff by the bar; but this always ought to be where a title is acknowledged to the plaintiff by the bar, and by another means destroyed by the same bar; for there it suffices the plaintiff to traverse that part of the bar which goes to the destruction of the title of the plaintiff comprized in the bar, without making any other title; but if he will traverse any other part of the bar, he cannot do it without making an especial title to himself in his replication, where by the bar the first possession appears to be in the defendant, because although the traverse there be found for the plaintiff, yet notwithstanding by the record in such a case the first possession will still appear to be in the defendant, which suffices to maintain his regress upon the plaintiff; and therefore

the Court has no matter before them in such a case to adjudge for the plaintiff, unless in cases where the plaintiff shews a special title under the possession of the defendant.

As for example; in trespass for breaking of his close, the defendant pleads that J. G. was seised of it in his demesne as of fee, and infeoffed J. K. by virtue of which he was seised accordingly, and so being seised, infeoffed the defendant of it, by which he was seised, until the plaintiff claiming by colour of a deed of feoffment made by the said J. G. long before he infeoffed J. K. (where nothing passed by the said feoffment) entered, upon whom the defendant did re-enter, here the plaintiff may well traverse the feoffment supposed to be made by the said J. G. to the said J. K. without making title, because this feoffment only destroys the estate at will made by the said J. G. to the plaintiff, which being destroyed, he cannot enter upon the defendant, albeit the defendant comes to the land by disseisin, and not by the feoffment of the said J. K. For the first possession of the defendant is a good title in trespass against the plaintiff, if he cannot shew or maintain a title paramount. But the feoffment of the said J. G. being traversed and found for him, he has by the acknowledgment of the defendant himself, a good title against him, by reason of the first estate at will acknowledged by the defendant to be to the plaintiff, and now not defeated; but in the same case he cannot traverse the feoffment supposed to be made by the said J. K. to the defendant without any special title made to himself; for albeit that J. K. did not infeoff the defendant, but that he defendant disseised him, or that he comes to the land by another means, yet he has a good title against the plaintiff by his first possession not destroyed by any title paramount by any matter which appears by the record upon which the Court is to judge; and with this accords the opinion of 31 E. 4. 1.

4. Trespass, &c. *quare fœnum suum cepit*. Upon not guilty pleaded, the plaintiff had a verdict; and it was moved in arrest of judgment that the declaration was ill, because he had not pursued his title made in the declaration. But Coke Ch. J. said, that *quare fœnum suum cepit is sufficient*. And the Court held clearly the declaration good; for it is only matter of surplufage for a plaintiff in trespass to make title in his declaration; and if he makes a title, and does not pursue it, or if his title be not good, it is not material, being only matter of surplufage, and nugatory. And by Doderidge J. *the plaintiff needs not make any title*, in an action of trespass, the same being a possessory action; *but if he do make a title in the way of evidence, he ought then to pursue the same, and make it good*, but he needs not to make any title in his declaration, saying that this hay was for tithe belonging to his farm, which is more than he needed to have done; this is but surplufage. And judgment for the plaintiff. 2 Bulst. 288. Mich. 12 Jac. Willamore v. Bamford.

5. In trespass for striking and killing *accipitrem ipsius the plaintiff*. After a verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiff did *not shew what kind of hawk it was*, whether a goshawk or lanner, &c. for accipiter is the genus, and he ought to shew the species thereof; *nor does he shew that the hawk was reclaimed*; for being *feræ naturæ*, no man can have property, unless reclaimed. But the Court held the declaration good enough, being in trespass for striking and killing, &c. which he only may have who has the possession. Cro. C. 18. pl. 11. Mich. 1 Car. C. B. Sir Fra. Vincent v. Leiney.

6. In an arrest of judgment in an action of trespass for *carrying away 24 load of timber*, the exception was, that the timber is *not said to be the timber ipsius querentis*, and so no cause of action. Upon this, judgment was arrested. Styl. 53. Mich. 23 Car. Wood v. Salter.

7. In trespass *quare clausum fregit, and threw down his fences*. [557] The defendant pleaded not guilty to all, but the breaking of the fences, and for that he *justifies; for that he was possessed of cer-*
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tain corn in the place where, as of his proper goods, and made a breach in the fence, as was necessary for the carrying of it away. The plaintiff demurs specially, because he did not shew by what title he was possessed of the corn. And the Court were of opinion that for that cause the plea was insufficient; and Twifden said, if the sheriff upon a fieri facias sells corn growing, the vendee cannot justify an entry upon the land to reap it, until such time as the corn is ripe. 1 Vent. 221, 222. Trin. 24 Car. 2. in B. R. Perrot v. Bridges.

S. C. cited
2 Lev. 156.
Hill. 27 &
28 Car. 2.
in B. R. in
case of
TERRY v.
STRADE-
WICKER, as

8. Trespass quare clausum fregit, herbas conculcavit, & diversas carectatas tritici ibidem asportavit. After verdict it was moved in arrest of judgment, because the plaintiff did not set forth whose wheat it was; for it was not said ibidem crescent, but ibidem asportavit. Adjournatur. Vent, 278. Mich. 27 & 28 Car. 2. B. R. Holland v. Ellis.

a case of the Michaelmas term before, as in trespass for eating up so many load of wheat then and there being, with cattle; and because the plaintiff did not say blada ipsius, judgment was stayed. — 3 Keb. 524. pl. 6. S. C. but that had it been ibidem crescent it would be intended sua; but here being carectat it is [to be intended] severed, and may be a stranger's goods; per Wild J. which the others agreed, and judgment staid. — S. C. cited Arg. Ld. Raym. Rep. 239. in case of FONTLEROY v. AYLMER, and says that Hale Ch. J. then said, that if it had been a new point, he would not have arrested judgment for this cause; for since the plaintiff has said that it was his close, the corn there should be intended prima facie his corn; but he said that there were so many precedents to the contrary, that because he would not over-rule them, he arrested the judgment for this cause. And there in the principal case of Fontleroy v. Aylmer, the count in trespass was of fishing in his several fishery, & pisces cepit; and exception being taken for not saying (suis) and so had not intitled himself to the action, he not having laid any property of the fish in him, the Court seemed to incline strongly that this exception was not very considerable for the reasons that Hale Ch. J. gave against his own judgment in that case of Holland.

9. In trespass of breaking his close, and taking his goods, the defendant justified the taking nomine districtionis, by command of the lord of the manor for non-payment of rent. The plaintiff replied that the place where, &c. is extra, absque hoc that it is infra feodum. The defendant demurred specially, because the plaintiff, pleading hors de son fee, should have taken the tenancy upon him. But the Court held that this is to be intended in cases of assise, and so Co. Litt. 1. b. is to be understood; but the principal case is an action of trespass brought upon the possession, and not upon the title; so that if the plaintiff destroys the defendant's justification, it is well enough. 2 Mod. 103. Trin. 28 Car. 2. C. B. Sherrard v. Smith.

10. Trespass vi & armis for taking the mare ipsius querentis, nec non bona & catalla sequentia, viz. and sums them up, but does not say they were the goods ipsius querentis; and thereupon the defendant demurs; and resolved the plaintiff may have judgment for the mare, and release the action for the residue. Raym. 395. Trin. 32 Car. 2. B. R. Cutforthay v. Taylor.

11. In trespass for chasing of his sheep, the defendant made countenance as bailiff to T. for damage-feasant in the acre of ground, of which T. was possessed; and there was a demurrer to the plea, because he did not shew what title or estate he had, nor any seisin or freehold; and therefore judgment was given for the plaintiff. Arg. 4 Mod. 419. Pasch. 7 W. 3. B. R. in case of Strode v. Byrt, cites it as Trin. 4 Will. & M. in C. B. Godfrey v. Rock.

12. Trespass

12. Trespass for *breaking his close at D. et duos equos apud D. and 20 bushels of wheat de bonis propriis ipsius, &c.* did take, &c. the defendant pleaded not guilty as to all but the horses, and as to them justified by distress for rent. After verdict for the plaintiff, it was moved in arrest of judgment, that the horses were not alleged to be the goods of the plaintiff. It was held that the plea did not confess a property; for a * distress might be of a stranger's goods for the rent, and that the copulative (&) did not let it into the subsequent part of the other sentence, so as to make the horses come under the words (de bonis propriis). 2 Salk. 640. pl. 9. Trin. 2 Ann. B. R. Joce v. Mills.

6 Mod. 14. Mich. 2 Ann. Joce v. Mills, S. C. held accordingly; and the Court said the case was no more than this; plaintiff in trespass declares, that the defend-

ant took away two cows from his land in Dale, and also 2 horses of the goods of the plaintiff from the said Dale; so that laying a venue for the taking of the 2 cows closes up the sentence, and interrupts its being coupled with the 2d sentence, or the matter of description which follows.

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13. In trespass for taking cows in the plaintiff's close, defendant pleads in bar, that they were damage feasant in clauso suo. Plaintiff demurs, because he set forth no title to the close. Resolved that it was well without it; for a possessory right is sufficient to maintain an action of trespass. And this difference was taken, that where the defendant justifies to a place specially laid down in the declaration, there a title must be shewn; but where no place is specially laid down, as here there is none, there he need not. 10 Mod. 37. Trin. 10 Ann. B. R. Osway v. Bristow.

(A. b) Plea good, without shewing Title in himself, or Authority from him who has.

1. TRESPASS against 2, the one said that the plaintiff was his villein, judgment, &c. and the other said that the plaintiff would not be justified, but esloined himself, and the lord took him as his villein, and the defendant came in aid of him; and the other said that frank, and of frank estate; and so see there and in several other books, he who justifies by coming in aid, does not say that he by command, or as servant of the other, nor at his request, came in aid, and yet well; therefore quære if the law implies request or command; for it seems that he cannot do it de son tort demesne. Br. Trespass, pl. 193. cites 39 E. 3. 16.

Br. Trespass, pl. 254. cites 30 Aff. 36.

2. In trespass the defendant said that the plaintiff himself leased the land to J. N. for 40 years, which term yet continues, judgment, &c. and no plea by award, without answering that he by his command, or as servant to the lessee, did the trespass; for this amounts but to not guilty, and that the termor should have the action, and not the plaintiff, who is lessor. Br. Trespass, pl. 57. cites 47 E. 3. 5.

But in mort-dancefloor, &c. it is agreed that the tenant may say that the plaintiff has an elder brother alive; or that he is

not next heir, &c. without making title; for the action affirms him. Contrary against a trespasser; note the diversity. Br. Trespass, pl. 57. cites 47 E. 3. 5.

(B. b) Plea. *What setting forth of Title is sufficient.*

1. **TRESPASS** of breaking his close, and spoiling his grass;

[559] Littleton said *the place is a great field inclosed round, through which field is a way common for horse and man to pass, and the plaintiff made there a gate over the way, and at the time of the trespass the defendant opened the gate, and went on by the way, & hoc, &c.* and a good plea, though he did not say the field is the frank-tenement of the plaintiff; for this shall be implied by the declaration, when it says *clausum suum fregit*, and the defendant did not deny this by the plea above, and therefore it shall be intended so; *quod nota.* Br. Trespass, pl. 298. cites 2 E. 4. 9.

2. In trespass, the defendant said that *J. S. was seised in fee whose estate he has*, and the plaintiff demurred, and gave colour by *J. S.* And by the opinion of the Court in a note, it was a good plea. Contra by the reporter. And Brooke says it seems to him that it is not a good plea; for *he does not convey title to the defendant*; but if he had conveyed title to any whose estate the defendant has, then well, as to say that *J. S. was seised in fee, and died seised, and the land descended to M. who entered, &c. whose estate he has*, or that *J. S. was seised in fee, and infeoffed N. &c. whose estate he has*, it is good. Br. Bar, pl. 74. cites 9 H. 7. 14.

♦ S. P. Br.
Trespass, pl.
286. cites
12 H. 7. 14.

3. Trespass of a close broken. The defendant said, that *the place where, &c. is an acre of land, of which he and M. his feme were seised in their demesne as of fee before, and at the time of the trespass.* And the defendant entered, and did the trespass, and exception was taken, because he did not say that *they were seised in jure uxoris, or jointly, & non allocatur*; for per Fineux Ch. J. it is * sufficient for the defendant to *intitle himself to any part of the land in whatsoever manner it be.* Br. Pleadings, pl. 84. cites 12 H. 7. 24.

4. In trespass the defendant pleaded, that *he leased the land to the plaintiff for another man's life, and that he, for whose life it was, was dead, upon which he entered.* And it is adjudged, that it suffices for the plaintiff to maintain that *cestuy que vie was yet living, without making any other title.* Poph. 1, 2. pl. 1. Mich. 34 and 35 Eliz. in B. R. in case of Fenner v. Fisher, Arg. cites 2 E. 4. fol.

5. In trespass for taking his cattle, the defendant pleaded that *he was possessed of a close for a term of years, and the cattle trespassed therein, &c.* The plaintiff demurred, and judgment was given for the defendant, though he shewed no title, but justified upon a bare possession. And this difference was taken by Holt Ch. J. where the action is transitory, as trespass for taking goods, the plaintiff is foreclosed to pretend a right to the place, nor can it be contested upon the evidence who had the right, therefore possession is justification enough. But in trespass *quare clausum fregit* it is otherwise, because there the plaintiff claims the close, and the right may be contested. 2 Salk. 643. pl. 16. Pasch. 8 Ann. B. R. Anon.

(C. b) Pleadings. *His Franktenement.* That the Place where, &c. is his Franktenement, or the Franktenement of his Master.

1. **T**RESPASS of *trampling his grass*, the defendant pleaded his *franktenement*. The plaintiff said, that the defendant took his grass modo & forma, prout, &c. and was not suffered to have this general averment against this special matter, by which he made title to the land. Br. Averment, pl. 7. cites 38 E. 3. 11.

2. In trespass the defendant said, that the place was his *franktenement* the day of the trespass supposed, judgment si actio. The plaintiff said, that the defendant disseised his father, who died, and the plaintiff entered; judgment, &c. And the defendant durst not demur in his first plea; for, by all the justices, the *disseisin* may well be tried in trespass, &c. And it does not appear if the trespass was before the entry or after, but it was tempore ingressus, &c. as it seems by the pleading, and was of grass spoiled, &c. Br. Trespas, pl. 80. cites 7 H. 4. 4.

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3. *Warranty to him, his heirs and assigns, it is a good estoppel against the defendant to say, that the land where, &c. is his franktenement*, quod nota, (by the assignee;) but the other took issue with him gratis; therefore quære, &c. For in trespass the same year, fo. 35, 36. the defendant pleaded his *franktenement*; and the plaintiff pleaded a *feffinent* by deed of J. P. ancestor of the defendant whose heir he is, to N. S. whose estate he has; and demanded judgment, if he against the deed of his ancestor, whose heir he is, shall be admitted to say his *franktenement*; but at last he was compelled to conclude upon the *franktenement*, because it is only an action of trespass; quod nota. Br. Estoppel, pl. 68. cites 14 H. 4. 13.

Br. Trespas,
pl. 102. cites
S. C.

4. In trespass of spoiling his grass the defendant said that the place, at the time of the trespass, was the *franktenement* of his master, by which by his command he entered and did the trespass, judgment, &c. The plaintiff said, that *de son tort demesne*, without such cause; and held a good plea. And yet if the master himself had been party, and had pleaded his *franktenement*, there this had been no plea; but the plaintiff had been compelled to have made title, or to have answered to the *franktenement*; but now the authority of the defendant is in issue, and not the *franktenement*. Br. De son tort, &c. pl. 13. cites 8 H. 6. 34.

5. In trespass the defendant justified, that it was the *franktenement* of his master E. by which he, by his command, entered and did the trespass. The plaintiff said, that before that E. any thing had, W. was seised, and infeoffed the plaintiff, who was seised till by T. disseised, who infeoffed the same E. and the plaintiff re-entered, and the trespass mesne between the disseisin and the re-entry. The defendant said, that N. was seised, and infeoffed E. judgment & non allocatur; by which he said as above, and traversed the disseisin, and so to issue. Br. Trespas, pl. 138. cites 21 H. 6. 5, 6.

Br. Tra-
verse per,
&c. pl. 84.
cites S. C.

6. In

But in the
time of E. 6.
he shall say
absque hoc
that J. S.
was seised in
fee, prout,
&c. Ibid.

6. In trespafs of entering into his close, if the *defendant says*, that J. S. was seised, and infeoffed him, and gives colour, the *plaintiff* may say that R. was seised, and leased to J. S. at will, who gave to the defendant, and R. re-entered, and infeoffed the plaintiff, absque hoc that J. S. any thing had, unless at will; and admitted for a good plea. Br. Trespafs, pl. 308. cites 5 E. 4. 1.

7. If a man justifies in trespafs as his franktenement, it is no plea that it was the franktenement of the defendant, absque hoc that the other leased. Br. Counterplea de Aid, pl. 21. cites 5 E. 4. 2.

8. In trespafs the defendant said, that the place is 20 acres, which was the franktenement of S. and he, as his servant, and by his command, entered, and S. took the beasts damage feasant, and delivered them to the defendant, to put them in pound, &c. which he did, &c. and it was held a good plea; for by such taking, the property is not out of the plaintiff; for if it was, then the plaintiff cannot have trespafs against the second trespassor; and the plaintiff traversed the franktenement, and would have pleaded another plea for the beasts, and was not suffered, for the first goes to all; for if it be not the franktenement of the defendant, he cannot distrain damage feasant. Br. Trespafs, pl. 329. cites 12 E. 4. 10.

9. Trespafs of beasts taken in A. in B. the defendant said, that he himself was seised of 4 acres called C. in B. aforesaid, and the same day found the beasts damage feasant in C. and took them and chased them towards the pound, and they escaped into A. and the defendant freshly retook them, which is the same taking, &c. Pigot said, of your own tort without such cause. And, per Brian and Chock J.

[561] this is no plea; for where the defendant intitles himself to the soil by the plaintiff, or his ancestors, or as his franktenement, this ought to be answered specially, and shall not say generally, that de son tort demesne; quod nota. And after, per Brian, the plea is good enough; for, by the plea, it is proved that he took them before. Br. De son tort, &c. pl. 22. cites 21 E. 4. 64.

Br. Plead-
ings, pl. 133.
cites S. C.

10. In trespafs of goods carried away, the defendant said, that the place is his franktenement, and he found the goods damage feasant. And per Cur. it is no plea without shewing the certainty of the land, because he has made to himself title to the goods, and therefore he shall shew the certainty as well as if he had made title to the franktenement in trespafs de clauso fracto. Br. Pleadings, pl. 77. cites 5 H. 7. 28.

S. P. Br.
Pleadings,
pl. 133. cites
S. C. But
contra where
he makes
title to the
land; for his

11. But in trespafs de clauso fracto the defendant may say, that the place where, &c. is his franktenement, without shewing the certainty of the land; because the writ and the plea are general, and he does not make title to the land; quod nota, per tot. Cur. Br. Pleadings, pl. 77. cites 5 H. 7. 28.

franktenement is no title, because it may be by disseisin; quod nota, per tot. Cur.

12. Trespafs quare in sepeciali piscaria sua piscatus fuit. The defendant pleaded franktenement; and a good plea, per Brian and Keble. But Wood contra. Quare if it had been in libera piscaria sua; for it seems that a man may have liberam piscariam in another's soil; but several piscary shall be intended in his proper soil. Br. Trespafs, pl. 426. cites 10 H. 7. 24.

13. Trespass for *taking and carrying away his trees*. The defendant pleaded the common bar, viz. that the place where the trespass was supposed to be, is his (the defendant's) freehold, and so justifies as in his freehold, &c. But adjudged ill; for this is no plea in trespass de bonis asportatis, but *peculiar only to a trespass quare clausum frēgit*. Quod nota. Carth. 176. Hill. 2 & 3 W. & M. B. R. Alstone v. Hutchinson.

14. In trespass for *breaking his close, and carrying away his wood and stones, &c.* the defendant justified, &c. *that the place where, &c. is called R. close, and is his freehold*. The plaintiff replied, that it was his freehold, and that the defendant, *de injuria sua propria, did break and enter, &c. and carried away the wood and stones, &c. and traversed that it was the freehold of the defendant*. And upon demurrer the defendant had judgment, because the plaintiff ought to have concluded his replication to the country, for there was no new assignment; for this always alleges, that the place mentioned therein is alias quam in Barra, so that the place being agreed on both sides to be the same, the traverse of the freehold must be ill. Therefore the plaintiff ought to have concluded his replication thus, viz. *that it was his freehold, and not the freehold of the defendant, & hoc petit quod inquiretur per patriam*. 2 Lutw. 1399. Trin. 5 W. & M. Hustler v. Raines.

15. There are 2 ways of pleading *liberum tenementum*; the one without any manner of certainty, the other with a certainty. 1st, If there be any certainty, as that the place is *Black-Acre*, liberum tenementum of him, then the way to reply is to make a new assignment. 2. If there be no certainty, the way is to ascertain the place, and to make himself a title to it in the replication. Arg. and per Cur. if a man declares *quare clausum* generally in such a vill, the defendant may plead *liberum tenementum*; and if the plaintiff traverse it, it is at his peril; for the defendant, if he has any part of his land in the whole town, shall justify it there; and therefore, in that case the better way is to make a new assignment. 6 Mod. 119. Hill. 2 Ann. B. R. in case of Elwis v. Lombe.

(D. b) Pleadings ill. Want of Certainty.

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See (C. b)
pl. 10. 15.

1. TRESPASS of *grafs cut*. Per Newton Ch. J. if the defendant justifies, and intitles himself specially, as by descent, feoffment, &c. he ought to shew the quantity of the land, as to say that the place contains 20 acres of land, &c. But contra where he says, *that the place where, &c. is his franktenement*. Note the diversity. Br. Trespass, pl. 153. cites 22 H. 6. 24.

S. P. Br.
Pleadings,
pl. 26. cites
S. C.

2. In trespass of an *assault and battery*, the plaintiff declares, *quod cum* the defendant die & anno, &c. the aforesaid plaintiff verberavit & vulneravit, &c. and upon that the plaintiff recovered. And now error is brought, and assigned in the declaration; because there is not any direct affirmation, that the defendant verberavit, &c. but it is *quod cum verberavit*. The prothonotaries

In trespass,
the plaintiff
declared
quare cum.
It was
moved in
arrest of
judgment,
being

but no rule was made, the Court being of opinion, that though the case in

the count, if it stood alone, might be bad, yet the recital of the original, which goes before, helps it. Earnes's Notes in C. B. 174, 175. East. 8 G. 2. WARREN v. LAPDORE. And cites CLARKE v. LUCAS, Mich. 2 Geo. 2. which was removed into B. R. by writ of error, and remains there undetermined.

being asked by the Court what the course was, said, that in C. B. it was *in debt* with a *quod cum*, &c. The Court liked the difference well; and said certainly, that such a declaration *in trespass* cannot be good, so the judgment was reversed. Noy, 58. Sheriff v. Diggs.

3. Trespass quare clausum fregit, & *spinas suas ad valentiam succidit*. After verdict, upon not guilty, and found for the plaintiff, it was moved in arrest of judgment, that the declaration was not good, because he does *not shew the quantity of the loads*, or load, and so it is uncertain; as in the case, COLE. 5. fol. 34. PLAYTER'S CASE, trespass quare pisces suos cepit; and of that opinion was the Court, but they would advise. Afterwards being moved again, in the end of the term, many precedents were shewn for the maintenance thereof, wherefore it was adjudged for the plaintiff. Cro. J. 435. pl. 3. Mich. 15 Jac. in B. R. Johns v. Wilson.

The reporter says, quare, if the action had been laid in the county of Cornwall, where it is usual to carry corn in the straw upon horses, whether the declaration would have been good. Ibid.

4. In trespass inter alia, for taking and *carrying away 40 loads of corn in the straw*. After verdict for the plaintiff it was moved, that the declaration was uncertain; for the plaintiff had declared for 40 loads of corn in the straw, and it does *not appear whether* they be *horse-loads*, or *cart-loads*, or what other loads of corn they are. But Glyn Ch. J. answered, that it is well enough expressed; for it being of corn in the straw, it shall be intended cart-loads, and therefore let the plaintiff have his judgment. Styl. 466. Mich. 1655. London v. Wilcocks.

5. Trespass quare clausum fregit, & *arbores succidit ad valentiam decem librarum*. To which the defendant demurred generally. The plaintiff prayed judgment for breaking of his close; but as to the other, the declaration was insufficient, because *not expressed what kind of trees*. 1 Vent. 53. Hill. 21 & 22 Car. 2. B. R. Tomlinson v. Hunter.

6. Trespass, &c. *against P. and T. of breaking his close, chasing and taking his beasts*. P. pleaded not guilty. T. justified by a *warrant in replevin, setting forth, that P. was possessed of the cattle, and that the plaintiff took them unjustly, whereupon P. complained to the sheriff, who made a warrant to the defendant to replevy the cattle*.

[563] Upon demurrer it was objected, that it was *not said that P. was possessed of the cattle ut de bonis propriis*. 2dly, That *no place was expressed where the complaint to the sheriff, nor where the warrant by him, was made*. 3dly, That he ought to have pleaded, that the warrant was in writing. But none of these exceptions were resolved, because the Court agreed that the declaration was ill, as to the chasing of the beasts, because it did *not shew what sort of beasts they were*; and so the parties agreed to amend on both sides. 2 Lutw. Rep. 1372. Hill. 3 & 4 Jac. 2. Dale v. Philipson & al'.

7 Trespass for *taking 200 bushels of salt*. The defendant justified under the statute, 10 H. 3. for laying a duty on salt, and that it was

was shipped to be exported, and not weighed; and that he was an officer, &c. and seised it. The plaintiff replied, *de injuria sua propria absque tali causa*. Upon demurrer, Holt Ch. J. said, that where a defendant justifies by authority at common law, as a constable by arrest for a breach of the peace, under process of the admiralty, &c. there *de injuria sua propria*, &c. is a good replication; and so it is where the defendant justifies by authority of an act of parliament, because that being a general law can be no part of the issue. And the Court held the plea ill, because the defendant did not shew what sort of salt this was, whether bay-salt, pit-salt, white-salt, &c. for the statute does not extend to all. 2 Salk. 628. pl. 3. Mich. 13 W. 3. Chance v. Weedon.

8. Trespas, &c. for entering his house, and taking several keys for opening the doors of the said house. Upon not guilty pleaded, the plaintiff had a verdict. It was objected, that the taking of each key was a distinct trespass, and might require several answers, and that the kind and number ought to be ascertained. But it was resolved, this was sufficiently ascertained by reference to the house. 2 Salk. 643. pl. 15. Pasch. 3 Ann. B. R. Layton v. Grindall.

(E. b) Traverse necessary in what Cases.

1. IN trespass of *grafs carried away*, the defendant pleaded his *franktenement*, and so justified. The plaintiff replied, that long before the defendant any thing had in the *franktenement*, one A. B. was seised in fee, and leased to the plaintiff for years yet continuing, by which he entered, and was possessed till the defendant did the trespass: and held good, without saying any thing more. D. 171. b. pl. 9. cites Fitzh. tit. Replication and Rejoinder, Trin. 41 E. 3.

S. P. And the defendant demurred because the plaintiff neither confessed or avoided the *franktenement* in the

defendant. And adjudged the replication good in trespass upon *franktenement* pleaded; but if a *seoffment* had been pleaded in bar, it had been otherwise. Jo. 352. pl. 4. Mich. 10 Car. B. R. Key v. Cook.

2. In trespass of *grafs cut*, which is local, a man cannot justify in another county, and traverse the county in the writ, but shall plead not guilty; for if the jury finds him guilty generally, and expressly in another county, the verdict is void; and if he says guilty generally, *modo & forma*, where it was in a foreign county, *attaint* lies, Br. Traverse per, &c. pl. 14. cites 9 H. 6. 62.

But in trespass transitory or moveable, as of goods carried away, or of battery, which may commence in

one vill, and continue in another, the defendant may justify in another vill in the same county, without traversing the vill in the writ. Br. Ibid.

But if it be of trespass local in D. as of trees or grafs cut, and he justifies in another vill, there he ought to traverse the vill in the writ. Note the diversity. Br. Traverse per, &c. pl. 14. cites 9 H. 6. 62.

And in replevin in D. he may say, that he took them in C. in another county, and traverse that he did not take in D. and make avowry to have return, &c. and this shall make issue; per Martin quod non negatur. Br. Ibid.

3. In trespass the defendant said, that the plaintiff bailed the bowl to A. in pledge for debt, who bailed it to the defendant, who re-bailed it to the plaintiff, which is the same taking. The plaintiff said, that R. gave [564]

R. gave it to him, and the defendant took it, *absque hoc* that he bailed to A. and a good plea, without traversing the bailment to the defendant; for he has traversed the bailment in pledge, which answers to all; quod nota, per Cur. Br. Trespafs, pl. 412. cites 10 H. 6. 25.

4. *Trespafs in D. of trees cut.* It is no plea, that there are 2 D.'s, and none without addition; for if he be guilty in any of the 2, the plaintiff shall recover; and if he has justification in any of the 2, he may plead it, *absque hoc* that he is guilty in the other. So in assise or account; contra in all other actions. Br. Brief, pl. 341. cites 3 E. 4. 26.—And see 2 E. 4. 10. not adjudged.—But 9 H. 6. 5. it is no plea. Ibid.

• As in assise against me, I may say that E. was seised and infeoffed me, and give colour to the plaintiff, without traversing the disseisin, because the writ is but a supposal.

5. In trespafs, if the defendant says that S. was seised, and infeoffed him, and gives colour to the plaintiff, and the plaintiff says that he himself was seised until disseised by the said S. who infeoffed the defendant, and he re-entered, and the trespafs mesne, &c. And the defendant says that a long time before the plaintiff any thing bad, the father of S. was seised, and had issue S. and died, and the plaintiff entered, upon whom the said S. entered and infeoffed the defendant; this is no plea, without traversing that S. did not disseise the plaintiff, because the disseisin is alleged by matter in fact; but otherwise it is where the disseisin is alleged by supposal. Br. Traverse per, &c. pl. 109. cites 15 E. 4. 22. per Catesby.

Br. Traverse per, &c. pl. 109. cites 15 E. 4. 22.

And if the plaintiff in trespafs quare claujum suum in S. called D. fregit, &c. there if the defendant justifies in another place,

6. In trespafs, the defendant justified, and gave the place a name; the plaintiff said that his plaint is of a trespafs done in another place, and shewed where, &c. and the name, &c. and because he did not answer to it, demanded judgment, &c. and well without traverse, that he has commenced his action of any trespafs done in the place where the defendant has justified. Br. Trespafs, pl. 369. cites 22 E. 4. 50.

he ought to traverse the trespafs in the place in the declaration; per Sterkey. And so see a diversity where name is given in the declaration, and where not. Br. Trespafs, pl. 369. cites 22 E. 4. 50.

S. C. cited in the case of LEECH v. MIDGLEY, Lev. 283. Hill. 21 & 22 Car. 2. B. R. which was trespafs for chasing 40 of his sheep ita quod they were damaged, and one of them died;

7. Trespafs of chasing his cattle, so that they died of the chasing. The defendant pleads, that the place where, &c. is holden of him by such services, and he distrained those beasts, and impounded them in a pound overt; and that they died there of hunger in default of the plaintiff, the which is the same trespafs. And it was thereupon demurred, and without argument adjudged for the plaintiff; for when the plaintiff alleged that they died of the chasing, and he pleads that they died of hunger, that is not any plea without a traverse that they did not die of the chasing. Cro. Eliz. 384. pl. 5. Pasch. 37 Eliz. Hill v. Prideaux.

the defendant justified damage feasant in his franktenement; the plaintiff replied, and claimed common in the place where, &c. the defendant rejoins and justified by enclosure, leaving sufficient common, &c. And upon demurrer it was insisted, that the plea not answering to the dying of one of the sheep, was ill; for he ought to have traversed the chasing upon which he died. But it was answered, this coming only under the ita quod, is only to aggravate the damages, and he needs not to traverse it. Keeling Ch. J. held the bar good for this reason, and the other 3 held that it is cured at least by the replication over; and judgment was given for the defendant. Lev. 253. Hill.

21 & 22 Car. 2. B. R. Leach v. Midgley.——Vent. 54. S. C. by the name of Leach v. Wildley, adjudged.——Raym. 185. Anon. S. C. adjudged.

8. In trespass of a battery in London, the defendant pleaded that the plaintiff assaulted him at D. in the county of S. and if he had any harm, it was *de son assault demesne*, and in his own defence, *absque hoc* that he was guilty in London. Upon demurrer it was adjudged no plea, that both the justification and traverse were not good; for a battery in his own defence is not local; and therefore he may justify in any place, and therefore he cannot plead it in another place, and traversed the place alleged. Cro. E. 842. pl. 21. Trin. 43 Eliz. C. B. Purfett v. Hutchins. [565]

9. Trespass of battery in such a parish and ward in London. The defendant justifies in the county of Cambridge, and arresting him there by warrant from the sheriff there, and traverses the battery in the parish and ward in the county mentioned; and for this cause it was demurred, and adjudged for the plaintiff that the traverse was ill to traverse the place, but he ought to have traversed the county. Cro. Eliz. 860. pl. 31. Mich. 43 Eliz. in C. B. Johnson v. Burton & Shut.

10. In trespass *quare ovcs*, &c. generally, the defendant prescribes for ewes, and says they were oves matrices. The plaintiff replies that they were oves verveces; this is not good without a traverse, *absque hoc* that they were oves matrices; per Richardson and Crook. Het. 29. Trin. 3 Car. C. B. in case of Johnson v. Morris.

11. In trespass *vi & armis* of breaking his close, and taking his cattle, the defendant as to the force and arms pleads non. culp. and as to the rest justifies that the cattle went in for default of the plaintiff's fence. The plaintiff replies that they came into through another's fence. The defendant demurs, because the plaintiff does not assign where the place of the other close lies, through which the cattle came. Plaintiff said it is not necessary to shew where it lies; for they went not in where the defendant has alleged, and so the traverse is well taken. Defendant answered that here is a new assignment, which answers not the trespass for which the action is brought; and because it is a new assignment, a new answer must be given, and therefore plaintiff must shew the place where the new assignment lies. Roll Ch. J. said he pleads no more but that the cattle came in at another place than is pleaded, and he needs not shew the place. Judgment for the plaintiff nisi. Sty. 357. Mich. 1652. Baker v. Andrews.

12. In trespass for entry, and pulling down of posts of a fishery, the defendant pleads he was lord of a manor, wherein was a river of Avon in which he had a fishery; and because the plaintiff set up posts there he pulled them down; for which cause the plaintiff demurred, as amounting only to the general issue, and so ill, unless there had been a traverse, *absque hoc* that he pulled down the posts in the plaintiff's fishing, to which the Court inclined, judgment pro plaintiff nisi. 2 Keb. 57. pl. 23. Trin. 18 Car. 2. B. R. Hely v. Raymond.

13. When the plaintiff in his declaration has assigned a day of the trespass done, and the defendant justifies the trespass upon the same

same day, there the defendant needs not traverse the day, because the day is agreed on both sides. 2 Saund. 295. Hill. 22 & 23 Car. 2. per Cur. in the case of White v. Stubbs.

2 Keb. 878.
pl. 50. S.C.
adjudged.

14. In trespass of breaking his close and *carrying away his goods*, the defendant pleads not guilty to the breaking of the close, and justifies the taking of the goods at a time varying from that alleged in the declaration, and concludes *quæ est eadem transgressio*, upon which it was demurred, because he *did not traverse the time before and after it*; and it was adjudged for the plaintiff. 1 Vent. 184. Hill 23 & 24 Car. 2. in B. R. Smith v. Butterfield.

15. In trespass of taking his goods, the defendant justified by recovery in an inferior court, and execution thereupon by a *fieri facias quæ est eadem captio*. And upon demurrer it was objected that the taking was alleged on one day, and the defendant in his justification varying from that day, ought to have traversed any other taking because the same goods may be taken at several times, and that the *quæ est eadem* is not sufficient. But it was said per curiam, he having averred that it was *eadem captio*, the averment was sufficient; and the parties by consent afterwards pleaded to issue. 2 Jo. 146. Pasch. 33 Car. 2. B. R. Allen v. Chamming.

[566] (F. b) Traverse. Good. In respect of the Thing.

1. THE use and prescription of *common appurtenant* was put in issue in trespass, and yet this is *in the right*, and the action is *in the possession*. Br. Prescription, pl. 89. cites 22 Aff. 63. and 30 Aff. 42. and 40 E. 3. 31. and 22 H. 6. 51. and 7 E. 4. 26. accordingly, and yet 40 E. 3. 10. he was put out of this plea. Ibid.

Br. De son
tort, &c. pl.
46. cites
S.C. Contra
44 E. 3. 18.
inasmuch as
the defend-
ant made
title to the
ward.

2. In false imprisonment, the defendant justified to seize the plaintiff by command of his master, as ward of the lord of D. his master, of whom the father held in chivalry, and the plaintiff was within age, and retained him 6 months, and then came one J. next heir, who was ravished into Scotland in the life of his father, by which the defendant waived him; judgment si tort, &c. Finch said the father held his land of J. S, and not of the master of the defendant. And so de son tort demesne without such cause, and was not suffered to traverse the tenure, by which he said that de son tort demesne, &c. Br. Faux Imprisonment, pl. 13. cites 22 Aff. 85.

So in trespass
of a horse, the
defendant
may say that
the plaintiff
gave him the
horse, by
which he
took it, and
the plaintiff
may say that
he was pos-
sessed of 2
horses, and

3. Trespass in one acre of land in D. The defendant justified by lease of the plaintiff of the same acre, where in truth the lessor had two acres in the same vill. And the opinion was, that it was dangerous for the plaintiff to say that he did not lease this acre, though the trespass was done in the other acre; but the best opinion was, that he shall be aided in this form, viz. to say that he was seised of 2 acres, and leased the one, and the defendant entered into it, and also into the other, and did the trespass, absque hoc that he leased the acre in which the trespass is supposed. Br. Trespass, pl. 381. cites 9 H. 6. 64.

gave the one, and the defendant took it, and also took the other; absque hoc that he gave the horse of which

which the action is brought; per Babb. and Paston & non negatur, and it seems to be good; for where a man has 2 acres or horses, and leases or gives the one which is uncertain, there the lessee or donee by his entry or taking makes it certain, and then if he meddles with the other he is a trespassor; but it was not adjudged. Br. Trespafs, pl. 381. cites 9 H. 6. 64.

4. Trespafs against the lord upon tenure. The plaintiff may traverse the tenure, but in avowry the seisin. Br. Trespafs, pl. 411. cites 10 H. 6. 3.

5. In trespafs the defendant pleaded his franktenement; the plaintiff said that he was seised till by the defendant disseised, by which he entered, and the trespafs which, &c. the defendant said by protestation, not confessing the disseisin, for plea said, that the plaintiff did not re-enter; and the opinion was, that it was a good plea, and that the regrefs is traversable. Br. Trespafs, pl. 367. cites 22 E. 4. 21.

6. In trespafs, if the defendant pleads satisfaction, this is only traversable; per Brian. Br. Traverse per, &c. pl. 179. cites 4 H. 7. 9.

But if he pleads accord, or pleads submission, arbitrement,

and satisfaction, the party may traverse the accord, submission, arbitrement, or the satisfaction. For when the party will allege the circumstances, and need not, there this is traversable; quod nota. Br. Traverse per, &c. pl. 179. cites 4 H. 7. 9.

7. In trespafs, the defendant justified under a custom of a manor; the plaintiff replied *de injuria sua propria absque tali causa*. The plaintiff should not have traversed the cause generally, but the custom; but being only matter of form, it is helped by the statute of jeofails, for *absque tali causa* contains the custom and more. Hob. 76. pl. 97. Banks v. Parker.

Brownl. 233. BANKS v. PARKER, Hill. 12 Jac. S. C. but S. P. does not appear to be spoken to by the Court.

(G. b) Traverse of the Command. Good or necessary. [567] In what Cases.

1. In trespafs, if the defendant justifies by command of the owner, the command is traversable. Br. Traverse per, &c. pl. 325. cites 14 H. 4. 32. 9 H. 6. 21 H. 6. 46. 22 H. 6. 34. 33 H. 6. 41, 42. 37 H. 6. 7. 13 H. 7. 13.

But if the defendant pleads that the place where, &c. is the frank-

tenement of A. and he by his commandment, &c. The commandment is not traversable, if the plaintiff claims by a stranger; because the franktenement being in a stranger ought to be answered. Arg. 6 Rep. 24. a. in Read's case, and seems admitted, cites Doctrina Placitandi, 352.

2. In trespafs if the defendant says that the ancestor of the plaintiff held of J. N. by service of chivalry, and he by command of J. took the infant plaintiff as ward; the plaintiff shall not say that de son tort demesne without such cause, but de son tort demesne, absque hoc that J. N. commanded; by which the plaintiff said accordingly, and so to issue. Br. De son tort, &c. pl. 42. cites 14 H. 4. 32 & 33 H. 6. 41. accordingly.

3. In trespafs of barley, and a horse taken; the defendant alleged property in a stranger, and that the plaintiff took them, and the defendant by the command of the stranger re-took, &c. and the other said, that de son tort demesne without such cause, &c. Br. De son tort, &c. pl. 15. cites 19 H. 6. 65.

Br. De son
tort, &c. pl.
11. cites
8 H. 6. 34.

4. In trespass, the defendant justified by command of J. N. The plaintiff said that *de son tort demesne, absque hoc* that J. N. commanded him modo & forma, and the others e contra. Br. de son tort, &c. pl. 2. cites 33 H. 6. 41.

Heath's
Max. 121.
cap. 5. cites
S. C.

5. In trespass the defendant said that the franktenement is J. N.'s, and he, by his command, entered; the plaintiff made title by lease of a stranger, by which he was possessed till the trespass, *absque hoc* that the defendant entered by command of J. N. And a good traverse per Cur. Br. Traverse per, &c. pl. 137. cites 37 H. 6. 7.

As in tres-
pals in land,
the defend-
ant said
that the

6. In trespass, when the command is the effect of the bar, it is traversable, and otherwise not. Br. Traverse per, &c. pl. 222. cites 7 E. 4. 2. per Markham Ch. J.

plaintiff before the trespass leased to R. at will, and he by command of R. entered and did the trespass; and per Markham Ch. J. it is no plea without privity, by which he said, that he by command, &c. entered and did the trespass; and no danger of the traverse of the command, for the lease is the effect and not the command. Br. Traverse per, &c. pl. 222. cites 7 E. 4. 2.

Heath's
Max. 110.
cap. 5. cites
11 H. 7. 9.

7. In trespass for grass cut, the defendant justified as servant of J. S. and by his command for using the common of the said J. S. and the plaintiff said that the defendant put in his proper beasts, whereof he brought his action; and a good plea without traverse; for it may be that he put in the beasts of J. S. and also his own beasts, but the defendant may say that he put in the beasts of J. S. *absque hoc* that he put in his proper beasts; per tot. Cur. Br. Traverse per, &c. pl. 385. cites 11 H. 7. 9.

8. If trespass be brought for cattle taken, &c. and the defendant justifies as bailiff to J. S. and by his command that he distrained them damage-feasant, if the owner did not command him, he shall be a trespassor. The same law for a distress for rent arrear, for the command is traversable; per Holt Ch. J. in delivering the opinion of the Court. *Ld. Raym. Rep.* 309, 310. *Hill. 9 Will. 3.* in case of *Britton v. Cole*.

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See (D. a. 2)
pl. 4. marg.

(H. b) Traverse of the *Day or Time*. Good or necessary. In what Cases.

1. **I**N false imprisonment such a day the defendant justified another day by commission to hear and determine trespasses, &c. *absque hoc* that he took at another day, and the other e contra. Br. Traverse per, &c. pl. 115. cites 24 E. 3. 3.

2. Trespass of beasts of the plow taken the first day of May; the defendant justified at another day for services due, and that there were no other beasts there, and traversed the day; and ill, for he ought to traverse the time of the taking only, and not the day. Br. Traverse per, &c. pl. 312. cites 33 E. 3. and *Fitzh. Brief*, 915.

3. Trespass of battery of his servant the 11 day of May; the jury found the battery another day; upon not guilty pleaded, the plaintiff recovered. And so the day not traversable. Br. Trespass, pl. 191. cites 39 E. 3. 1.

4. Trespass

4. Trespass by a bishop; the defendant shewed certain meddling by him the time when the temporalities were in the hands of the archbishop of Canterbury, absque hoc that he did any such act after that the temporalities came to the hands of the plaintiff, and the plaintiff maintained as here, prist; and yet the answer amounts only to the general issue, as it seems. Br. Trespass, pl. 194. cites 39 E. 3. 19.

5. In trespass of assault the Monday, where in truth it was the Saturday, and he pleaded not guilty modo & forma, and the jury finds the truth, the plaintiff shall recover; and therefore the defendant said, that such another day the plaintiff made an assault upon him, and the ill which he had was de son assault demesne, and in his defence, absque hoc that he was guilty before or after the same day that he justified; and to this he was compelled by the Court, quod nota. Br. Traverse per, &c. pl. 75. cites 19 H. 6. 47.

6. In trespass of assault and battery the 10th day of August anno 17 H. 6. the defendant justified de son assault demesne the 14 day of Jan. anno 18 H. 6. absque hoc that he is guilty the 10 day of Aug. anno 17., &c. And per Newton and Paston clearly, he ought to traverse absque hoc that he is guilty before or after the said 14 day of Jan. for if he be found guilty any other day he shall be condemned; and Markham would not traverse so, by which Yelverton demurred. Br. Traverse per, &c. pl. 16. cites 20 H. 6. 14, 15.

For it was said, that if a man justifies in trespass for common between Lammas and Michaelmas, he ought to traverse that he is not guilty before

nor after this time of commencing; quod nota. Br. Traverse per, &c. pl. 16. cites 20 H. 6. 14, 15.

7. Trespass of taking his cow; the defendant justified because the property was to H. R. who sold it to him at S. in the county of C. &c. The plaintiff said, that the sale to the defendant was the third day of October anno 20. and before this, that is to say, the 4 day of August, in the year aforesaid, the said H. R. sold it to the plaintiff at C. in the county of N. and the other said, that he sold it to him, absque hoc that he sold it to the plaintiff before that he sold to the defendant, and so to issue; for Portington would not traverse the day but the time. Br. Traverse per, &c. pl. 94. cites 21 H. 6. 41.

8. In trespass the defendant justifies the taking of beasts by precept of wythbernham to him directed such a day before Whitsuntide; the other said de son tort demesne, absque hoc that he had precept to him directed before Whitsuntide, whereas the day that the plaintiff counted was the Monday before Whitsuntide anno 19 H. 6. Prist. Danby said he took the beasts of the plaintiff by force of the warrant before the said feast; prist; et sic ad patriam. Br. Traverse per, &c. pl. 103. cites 22 H. 6. 36.

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9. Trespass. The defendant justified, because at another day after, the place where, &c. was the soil and franktenement of J. N. who leased to him for 10 years, &c. and as to any trespass before not guilty. And in trespass anno the 18. the defendant justified by descent from his father the 19. and to any trespass before not guilty. Br. Trespass, pl. 160. cites 22 H. 6. 49.

10. In trespass, the defendant pleaded award made at W. in the county of M. to pay 10 s. which he has paid; the plaintiff said that before this the arbiters awarded him to pay 10 s. and a horse at D.

in the county of C. and he has not paid the horse; the defendant maintained his bar *absque hoc* that they did award in the county of C. *prout*, &c. before the award made at W. Prist, and the others *e contra*; and so note the county and the time traversed. Br. Traverse per, &c. pl. 107. cites 22 H. 6. 52.

As in trespass of
[tearing]
an obligation
bailed to

11. In trespass, note, always where a man traverses the time it is no plea without shewing the day certain. Br. Traverse per, &c. pl. 165. cites 39 H. 6. * 45.

the defendant to keep and redeliver; and he says that it was bailed to him to deliver over to W. N. which he has done, *absque hoc* that he tore it before the delivery to W. N. this is no plea, without shewing at what day he delivered it to W. N. *quod nota* per Cur. by which he shewed the day, &c. and traversed as above. Br. Traverse per, &c. pl. 165. cites 39 H. 6. 45.

* Misprinted in all the editions, and should be 44. pl. 7.

12. Trespass upon 5 R. 2. by A. against B. The defendant said that before the entry J. N. was seised and infeoffed the defendant, and gave colour, &c. The plaintiff said that before J. N. any thing had, he himself was seised in fee till by B. disseised, who infeoffed the said J. N. who infeoffed the defendant, upon whom he entered and was seised till the trespass. Littleton said a long time before the plaintiff any thing had B. was seised and infeoffed J. N. who infeoffed the defendant, and the plaintiff claiming as above, entered and was seised till B. entered upon and disseised him, *absque hoc* that B. disseised the plaintiff before the feoffment made by B. to the said J. N. Prist, &c. and the others *e contra*; and a good issue per tot. Cur. Brook says he wonders that the time was traversed as here; for he says it seems that the disseisin only shall be traversed. Br. Traverse per, &c. pl. 204. cites 1 E. 4. 6. — And that so it was said for law in C. B. 6 E. 6. per Hale Justice and others, and that this book is not law. Ibid.

13. In false imprisonment, the defendant justified at another day after, *absque hoc* that he was guilty before, &c. And there per Danby, the plaintiff ought to reply that guilty the day in the declaration, *prist*, &c. and yet if he be found guilty any day that the defendant has not justified, the plaintiff shall not recover; but the plaintiff cannot reply that guilty *modo & forma prout*, &c. for this goes as well to the day that the defendant has justified, as to other days, which is ill; *quod* Danby concessit. Br. Replication, pl. 40. cites 5 E. 4. 5.

And there
it was said
that the de-
fendant in
such case
pleaded re-
lease of the
plaintiff be-
fore the day
of the bat-
tery supposed
in the de-
claration,

absque hoc that he was guilty after, and the issue was joined upon the release; *quod mirum est* by the reporter; *quare legem*; for it is only a note. Ibid.

14. Trespass of assault the 1st of July, anno 2 R. 3. Defendant said that *postea*, viz. 4 die Januarii in the same year, the plaintiff made an assault upon the defendant, and he beat him in his defence, *absque hoc* that he was guilty before or after the said 4th day of January. The plaintiff said that *de son tort demesne absque tali causa*; and it was said that the plaintiff ought to reply that guilty *modo & forma*, &c. But he may give other day in evidence. Brook makes a quære, and says *mirum*! because the day only is now in issue. Br. General Issue, pl. 92. cites 2 R. 3. 11.

[570] 15 False imprisonment. The plaintiff supposed the trespass and false imprisonment to be 10 December 29 Eliz. The defendant

pleads

pleads that he by a warrant of the sheriff, &c. did arrest and imprison him 2 & 3d die Decemb. before, absque hoc that he was guilty before or after, &c. The plaintiff replied he was guilty, &c. after the 3d day of Decemb. prout in narratione sua specificatur; it was found for the plaintiff. It was moved that the issue was not well joined; for it is that he was guilty, &c. after the 3d day, &c. but says not, and before the action brought. But it was ruled to be well joined; for when it is said he was guilty after the 3d day, &c. prout, &c. it is to be intended between the 3d day and the day of the which he counted. And the plaintiff had judgment. Cro. E. 95. pl. 6. Pasch. 30 Eliz. B. R. Richardson v. Pricket.

16. Trespass was alleged to be done 7 Maii. The defendant justified on the 10th of May, and concluded his plea thus, *quæ est eadem transgressio*. And upon demurrer this was held a good plea by 3 judges against Yelverton; for the precise day need not be answered; it is sufficient that the justification be on another day, so as there is an averment that it is *eadem transgressio*. And judgment quod querens nil capiat, &c. Bulst. 138. Trin. 9 Jac. Vastelnope v. Taylor.

So in trespass for taking two bats in Suffex 10 Jan. 35 Car. 2. The defendant justified for stallage in a fair by pre-

scription at G. in Kent, on Sept. 14. 35 Car. 2. &c. *quæ est eadem transgressio*, &c. and traversed that he was guilty of the taking any where out of the said fair; and upon a special demurrer, for that the plea did not answer the declaration, it was insisted that the traverse was ill, because the defendant did not traverse the time of the taking, as well as the place; but per Cur. the conclusion *quæ est eadem* with a traverse of the place, is good without a traverse of the time. And judgment for the defendant. 3 Lev. 227. Trin. 1 Jac. 2. C. B. Bodle v. Wilkins.

17. Trespass for entering his close and taking his goods 9 Oct. 20 Car. 2. the defendant pleaded that R. was seised in fee, and 23 July 20 Car. 2. demised the place where to the defendant, and that he 16 July demised to the plaintiff for a quarter of a year, which ended 16 October 20 Car. 2. and because the goods were there after the quarter of a year ended, he took them damage-feasant, absque hoc that took them 9 October, or on any time within the quarter of the year. The plaintiff replied *de injuria sua propria absque tali causa*; upon which the defendant demurred. And it was resolved that the replication *de injuria*, &c. absque tali causa was ill; for it may be that he took them before the quarter of the year, and before the demise to the defendant by R. by which judgment was given for the plaintiff. And it seems that the traverse ought to be absque hoc that the 9th October, or any time before the 23d July, or during the quarter of the year, &c. Lev. 307. Hill. 22 & 23 Car. 2. B. R. White v. Stubbs.

2 Saund. 294. S. C. adjudged for the plaintiff. — 2 Keb. 735. pl. 28. S. C. adjudged accordingly.

18. In trespass the defendant justified by a precept out of a hundred court, and traversed that he was guilty before the delivery of the precept, or after the return. And upon demurrer it was objected, that this traverse is not good; it should have been before the teste, or after the return of the precept; sed non allocatur; for if the traverse is too narrow, it is to the prejudice of the defendant, and not of the plaintiff. 2 Lev. 81. Hill. 24 & 25 Car. 2. B. R. Doe v. Parmitter.

19. In an action of trespass, &c. the defendant justifies by a licence, &c. and in his justification agrees in time with the plaintiff's

tiff's declaration. He need not traverse before and after, and cites Hob. 104. But then the plaintiff may vary his time. Freem. Rep. 246. pl. 257. (bis) Hill. 1677. Anon.

20. In trespass, assault, and battery, the defendant *pleaded a general release of all actions, &c. from the beginning of the world, usque ad diem datus* of the said release. And it happened that the battery was done upon that very day in which the release was dated; so that it was held that this action was not discharged, for the release did not include that day. The defendant *should have traversed all, &c. after the day of the date of the release.* 4 Mod. 182. Pasch. 5 W. & M. in B. R. Dixon v. Terry.

21. In trespass laid to be done *1st of August*, the defendant *justifies for right of common after the corn is cut, and that after it was cut he put in his cattle, absque hoc quod est culpabilis aliter vel alio modo.* And upon a demurrer to this plea it was adjudged ill, because it did not answer the trespass done *1 August*, it having no reference to that time. 3 Salk. 357. pl. 14. Pasch. 9 Will. 3. Anon.

• This case was Mich. 18 Car. 2. in C. B. but adjournatur. Cart. 86.

22. In trespass of battery and false imprisonment, the defendant *justifies under a capias, teste the 27 Jan. and returnable 10th of April following, and says, that by virtue thereof he took the plaintiff the 9th of March, and discharged him the 10th; absque hoc that they were guilty at any time before the teste, and after the return of the writ; so that there is a time not traversed, in which the defendants may be guilty, notwithstanding any thing that appears to the contrary, viz. between the 10th of March, which was the day of the discharge of the plaintiff, and the 10th of April, which was the return-day of the writ. And they cited Carter, 84. * ATKINS v. CLEAVER.* And of this opinion was the whole Court. *Ld. Raym. 231. Trin. 9 W. 3. in case of Truscott v. Carpenter and Man.*

(I. b) Traverse of the Place necessary in what Cases.

Heath's Max. 108. cap. 5. cites S. C.

1. **I**N trespass of battery at B. the defendant said, that the plaintiff *the same day assaulted him at S. and the ill which he had was de son assault demesne, and in his defence, absque hoc that he assaulted him at B.* And the plaintiff said, that *de son tort demesne, without such cause; and well, per Cur. without maintaining the place, because B. and S. were in one and the same county, and the trespass transitory.* Br. Traverse per, &c. pl. 38. cites 43 E. 3. 29.

Heath's Max. 108. cap. 5. cites S. C.

2. *Contra* where the place was in another county, or if it was of *trespass local; per Cur. in the absence of Thorp. But some of the persons present said, that he ought to have maintained his writ.* Br. Traverse per, &c. pl. 38. cites 43 E. 3. 29.

In trespass in Middlesex, of goods, &c. the defendant may plead gift in

3. In trespass, in Middlesex, of goods carried away, the defendant *justified the taking in London, by reason of a gift; and no plea, without traversing the taking in Middlesex.* Br. Traverse per, &c. pl. 47. cites 11 H. 4. 3.

Essex, by which he took them, and shall not traverse; for gift is sufficient to take the goods in any county. Br. Traverse per, &c. pl. 71. cites 19 H. 6. 50. 71. — S. P. Ibid. pl. 127. cites 9 E. 4. 26. — S. P. Ibid. pl. 300. cites 9 E. 4. 49, 50. — S. P. per Priox. *Contra* of delivery; for the delivery cannot be but in one place only. Br. Traverse per, &c. pl. 284. cites 34 H. 6. 5.

4. In

4. In trespass of *cutting reeds in D.* it is no plea, that the place where, &c. is in *S.* and not in *D.* but may justify in another place by special matter, absque hoc that he is guilty in *D.* Br. Traverse per, &c. pl. 55. cites 9 H. 5. 9.

Br. Trespass, pl. 107. cites S. C.

5. In trespass local in *D.* the defendant justified in *S.* in the same county, and to the trespass in *D.* not guilty; and well; for he ought to traverse in *trespass local*, contra in *trespass transitory*. Br. Traverse per, &c. pl. 291. cites 14 H. 6. 21.—and 8 H. 6. 36.

In trespass transitory, as battery, or goods carried away, the place shall

not make issue, nor is it traversable, no more than in trespass upon the case of an assumpsit, and those may be continued. Contra of trespass local, as trees cut, and grass mowed. Note the diversity. Br. Traverse per, &c. pl. 283. cites M. 2 M. 1.

* Trespass of assault and battery in London. The defendant justified in the county of *N.* by a warrant from the sheriff of *N.* upon a latita, quæ est eadem transgressio, absque hoc that he was guilty in London, or elsewhere extra com' *N.* It was demurred because he justifies, and also traverses. But the Court held it well enough, because the justification being in another county, the county where the action is brought ought to be traversed, and the plaintiff may maintain the action and issue if he will, or traverse the plea at his election, Cro. J. 372. pl. 1. Trin. 13 Jac. B. R. Bateman v. Woodcock.—Roll. Rep. 221. pl. 26. S. C. adjudged accordingly, though it was objected, that the plea is double; for the justification in *N.* quæ est eadem transgressio had been sufficient without more, and then the traverse makes it double, and said he had a report in point adjudged accordingly. But the Court told him, that he could not take advantage of this upon a general demurrer.

* [572]

6. In trespass against *J. N. of F.* it is no plea that he was dwelling at *B.* the day of the writ, unless he says and not at *F.* Quod nota. For the negative makes the issue. Br. Traverse per, &c. pl. 67. cites 19 H. 6. 1.

7. Bill of disceit, for that the defendant, deputy of the sheriff of *B.* embezzled a writ of habeas corpus in the county of *Middlesex*, and brought the bill in *Middlesex*. The defendant said, that the high sheriff of *B.* by *J. N.* his under sheriff, commanded him at *B.* in the said county of *B.* to retain it after the delivery, and before the subtraction, and not to return it, by which he retained it, which is the same subtraction, &c. And by the best opinion, because he said, that it is the same subtraction, which is in another county, and does not traverse the subtraction in *Middlesex* alleged in the bill, it is no plea. Br. Traverse per, &c. pl. 71. cites 19 H. 6. 50. 71.

8. So of false imprisonment in *Middlesex*, and the defendant justifies in *Essex*, he ought to traverse in *Middlesex*; per Markham. Br. Traverse per, &c. pl. 71. cites 19 H. 6. 50. 71.

9. Trespass of battery and imprisonment at *W.* the defendant justified at *S.* because the defendant would have robbed at *S.* absque hoc that he imprisoned him at *W.* And the absque hoc was ousted; for he may justify by this matter in any place in this county. Br. Traverse per, &c. pl. 127. cites 9 E. 4. 26.

In trespass of battery in *C.* the defendant may justify in *B.* if it be in the same county,

without saying that the assault continued, and without traversing the assault in *C.* quod nota, which the Court granted. Br. Traverse per, &c. pl. 287. cites 35 H. 6. 50, 51.

10. But if he justifies by franktenement in another vill, there ought to be a fans ceo. Br. Traverse per, &c. pl. 127. cites 9 E. 4. 26.

11. Trespass of cutting and carrying away in *C.* the defendant justified in *B.* And because he does not answer to the trespass, judgment was given for the plaintiff; for he ought to have traversed absque hoc that he is guilty in *C.* But otherwise it is in trespass of battery. 2 Roll. Rep. 495. Hill. 22 Jac. B. R. Oxford (Bp.) v. Adams.

(K. b) Traverse of the Place. Good or not.

1. **I**N trespass of sheafs taken, the defendant justified for tithes, and the other the like, both as parsons of 2 parishes; and the issue was, if the place was in one parish or the other. Br. Traverse per, &c. pl. 340. cites 50 E. 3. 20.

Heath's
Max. 108.
cap. 5. cites
S. C.

[573]

* Orig. is
(tenant) in
the large
edition, but
the others
are (tout).

2. In trespass of goods taken, the defendant said that before the plaintiff any thing had, J. S. was possessed, &c. and bailed to W. N. in another place in the same county, who made the defendant his executor, and died, and the defendant seized them as executor in another place in the same county which the plaintiff did not count of, and the plaintiff took them, and the defendant re-took them, absque hoc that he took them in the place where the plaintiff counted; per Babb. Just. This is no plea, where the * whole is in one and the same county. Contra if it was in diverse counties; for then you shall have the traverse, by which he omitted the traverse. Br. Traverse per, &c. pl. 62. cites 7 H. 6. 35.

3. *Trespas in D. in the county of Derby.* The defendants justified in T. in the county of Nottingham, absque hoc that they are guilty in D. modo & forma. And per Cur. nothing was entered but not guilty; for he cannot justify in another county, absque hoc that he is guilty in the county named in the writ; for in trespass in D. upon not guilty, the jury may find him guilty in another vill in the same county, but not in another county; for this is a void verdict. Br. Trespas, pl. 19. cites 9 H. 6. 62.

4. Trespas upon the case, for that the defendant sold to him certain wood at N. for 20l. and shewed a portion of that which was good and merchantable, and warranted the rest to be as well marked as the portion was, whereas the remnant was defective, to the damage of 20l. Newton said he sold to him certain wood at B. and warranted this wood good and merchantable, that is to say for such a sum and so many † parcels as the plaintiff had declared, which was good and merchantable, absque hoc that he sold to him at N. prout, &c. and a good plea per tot. Cur. Br. Traverse per, &c. pl. 150. cites 14 H. 6. 22.

† Orig. is
(vessels) in
all the edi-
tions; but
the Year-
book is
(parcels).

5. Trespas of imprisonment and battery at B. in the county of H. [till] he made fine. Yelverton said actio non; for as to the vi & armis assault and battery not guilty, and to the imprisonment that he sued attachment against the plaintiff, directed to the sheriff of London to arrest the plaintiff, returnable such a day, to answer him of a trespass, &c. by which A. B. minister of the sheriff at B. in the ward of B. in London, by virtue of the attachment arrested the plaintiff, and carried him to the compter, and the defendant came in aid of him, absque hoc that he is guilty of the imprisonment at B. modo & forma, and to the fine pleaded not guilty. Markham said guilty at D. in the county of H. prout, &c. and the others contra. Quere of this traverse; for it seems that it ought to be absque hoc that he is guilty in the county of H. Br. Traverse per, &c. pl. 73. cites 19 H. 6. 35.

6. In

6. In trespass of goods taken at E. Fortescue pleaded *actio non*; for before the taking the plaintiff himself delivered the goods to the defendant at C. in the county of Middlesex, to deliver to S. N. which he has done, absque hoc that he is guilty of the taking at E. & hoc, &c. and demanded judgment si *actio*; and upon argument it was held a good plea per tot. Cur. Br. Traverse per, &c. pl. 74. cites 19 H. 6. 43.

S. P. Per Prisot; for there is no mesne instant. Br. Traverse per, &c. pl. 284. cites 34 H. 6. 5.

7. Trespass of goods taken at E. in the county of York. Fortescue said the plaintiff bailed to us the same goods at N. in the county of Middlesex to bail to J. S., &c. absque hoc that he is guilty at E. in the county of York, prist, &c. And the opinion of the Court was, that it is a good plea. Brook says, *quere* if he shall not traverse the taking in the county of York; for the place certain is not much to the purpose. Br. Traverse per, &c. pl. 76. cites 19 H. 6. 48.

In trespass of battery of his servant at B. in the county of E. the defendant justified de son tort demesne at F. in the county of

Middlesex, absque hoc that he is guilty in the county of E. and not at B. in the county of E. and good, and the other e contra; quod nota, the county traversed, and not the place; for if he be guilty at any place in this county, it is sufficient for the plaintiff. Br. Traverse per, &c. pl. 85. cites 21 H. 6. 8, 9. — Heath's Max. 108. cites S. C. — Br. Traverse, pl. 293. cites S. C.

So in trespass of cutting his grass at D. in the county of D. the defendant justified at S. in the county of S. absque hoc that he is guilty at D. in the county of D. et non allocatur; for by the opinion of the Court he ought to traverse the trespass in the county of D. and not the place; by which he did accordingly, and a good plea per Cur. Quod nota. Br. Traverse per, &c. pl. 102. cites 22 H. 6. 35.

In trespass the plaintiff declared on a battery at D. in the county of Middlesex, the defendant pleaded *son assault* at S. in the county of G. absque hoc that he was guilty at D. in the county of Middlesex; upon demurrer it was insisted that the traverse was not good, and put a difference between justification, local and transitory. And it was adjudged after many motions, that the county was not traversable, and so judgment was given for the plaintiff, Gawdy J. being of a contrary opinion. 2 Le. 79. pl. 104. Pasch. 26 Eliz. B. R. Partridge v. Pool. — 3 Le. 97. pl. 139. S. C. in the same words.

* [574]

8. Trespass in A. in the county of B. the defendant justified by precept of the sheriff, &c. at S. in another county, absque hoc that he is guilty in the county of B. and the other said that guilty at B. prist, and to this he was received; and yet if he be found guilty in any place in the county of B. the plaintiff shall recover, notwithstanding the rejoinder in B. but it seems that he shall say, guilty in the county of B. prout, &c. but *quere* inde. Br. Traverse per, &c. pl. 79. cites 19 H. 6. 57.

9. Trespass of a close broken, and battery at N. The defendant to the close broken justified in C. absque hoc that he is guilty in N. and well, because it is all in one and the same county; for otherwise it seems that he shall say not guilty, if it was in another county, as in 9 H. 6. and to the battery he justified in C. absque hoc that he is guilty in N. and the traverse was ousted, because it was a trespass transitory. Br. Traverse per, &c. pl. 90. cites 21 H. 6. 26.

10. Where the defendant in trespass of corn intitles himself to the tithes severed, &c. as parson of A. alleging that all the vill of B. is in the parish of A. and that those tithes grew in B. and the plaintiff intitles himself by sale of the tythes by the parson of O. for 7 years, and that they grew in a place called P. in B. Absque hoc that all the vill of B. is in the parish of A. this is a good traverse by award. Br. Traverse per, &c. pl. 95. cites 21 H. 6. 43.

11. In trespass of assault to his servants at B. it is held a good plea that the servants were cutting the grass of the defendant at C. by

which he prohibited them, and laid his hands upon them and commanded them to go out of his land, absque hoc that he assaulted them at B. And yet contra it is said where the defendant justifies by the assault made by the plaintiff himself to the defendant. Note the diversity; for in the first case the justification arises by reason of the soil, contra in the second case, and therefore in the one case the place is traversable, and in the other not. Br. Traverse per, &c. pl. 17. cites 27 H. 6. 9.

12. In trespass of beasts wrongfully taken in D. the defendant said that he was seized of 2 acres in S. and found them there damage-feasant, and he took them there, absque hoc that he is guilty in D. And a good plea without traversing all the county, otherwise it is of things which may be continued, as battery or goods carried away. Br. Traverse per, &c. pl. 306. cites 11 E. 4. 9.

13. Trespass of goods taken at D. in the county of Middlesex, defendant pleaded that before the trespass supposed J. S. was possessed thereof, and bailed them to the plaintiff in the county of E. for safe keeping there, and after J. S. commanded the defendant to take the goods of the plaintiff in the county of E. by which he took them at N. in the county of E. and delivered them to the said J. S. absque hoc that he took them at D. in the county of Middlesex; and because his warrant was to take them in the county of E. therefore a good plea for the loss of his evidence, and shall not be compelled to take the general issue. Br. Traverse per, &c. pl. 278. cites 22 E. 4. 59.

14. In battery, &c. the action was laid in London, when in truth it was done at Uxbridge; the defendant pleaded that on such a day and year the plaintiff at A. in the county of H. made an assault upon him and the harm, &c. absque hoc that he is guilty in London. The whole Court held it a good plea. Goldsb. 2. pl. 5. Pasch. 28 Eliz. Webster v. Paine.

15. Replevin. The defendant avows the taking in Wh. Acre damage-feasant; the plaintiff replies that they were taken in Bl. Acre, absque hoc that they were damage-feasant in Wh. Acre: and it was thereupon demurred. The Court without argument ruled it to be an ill traverse; for he ought to have traversed the place of the taking, and not that they were damage-feasant; and adjudged for the avowant. [575] Cro. E. 372. pl. 11. Hill. 37 Eliz. B. R. Watts v. Hagden.

16. In trespass for killing his dog at E. the defendant justified in D. within the same county as warrener there, and that the dog was killing of conies as he had done before, absque hoc, &c. that he is guilty apud E. prout, &c. And it was thereupon demurred because he traverses the place only, &c. and does not traverse all other places. But all the Court held that the traverse was good when his cause of justification is local, and that he needed not allege any more than that place. Wherefore it accordingly was adjudged for the defendant. Cro. J. 44, 45. pl. 13. Mich. 2 Jac. B. R. Wadhurst v. Damme.

17. Trespass of false imprisonment at C. the defendant justified as steward of the court of the Stanneries at A. by process of the court there;

there; *absque hoc* that he was guilty at any place *extra jurisdiction* curia Stannaria; but neither justifies or traverses the imprisonment alleged at C. which might be within the jurisdiction, and was not answered to; and therefore judgment was given against the defendant for default in the plea, because the traverse was not large enough. 2 Lutw. 1563. in the appendix, in the argument of Sir John Powell in the case of GWINNE v. POOLE, cites 1 Roll. Rep. 264. Evely v. Sloley.

judged accordingly.—
Roll. Rep.
264. pl. 37.
Mich. 13
Jac. B. R.
adjudged accordingly.—
Hob. 180. pl.
216. SLOW-
LEY v.

EVELLY, S. C. in the Exchequer; but S. P. does not appear. — Cro. J. 439. pl. 11. Mich. 15 Jac. in the Exchequer, EULEY v. SLOLEY, S. C. but S. P. does not appear.

18. Trespas of *breaking his close, and digging his soil*. The defendant pleads, that the place where is 2 acres called *Bl. Acre*, which is his freehold, and so justifies. The plaintiff replies, that the place called *Bl. Acre* is his freehold, *absque hoc* that it is the freehold of the defendant. The defendant demurred, because it is but a common or *blank bar*, and is only to inforce the plaintiff to assign his trespas in a place certain, the declaration being general, and so the bar not traversable; and of that opinion were Doderidge and Chamberlain. But Houghton *e contra*, and the plaintiff may assign a new place, or traverse this bar at his election; *per quod adjournatur*. Cro. J. 594. pl. 16. Mich. 18 Jac. B. R. Rickman v. Cox.

19. In trespas for *breaking and entering his close called Horn-Hill in the parish of R. and chasing, taking, and impounding his sheep there found; &c.* The defendant as to all, besides the chasing, taking, and impounding, pleads not guilty; and as to that, he justifies that he was seised in fee of a close called *Orchards* in R. and took the sheep there damage-feasant, &c. *absque hoc* that he took and impounded them in the close aforesaid called *Horn-Hill*, *modo & forma*, as the plaintiff declared. The plaintiff demurred specially, and adjudged for him, because the traverse is ill, it being of matter not alleged; for the plaintiff does not say that the defendant took the sheep in the close called *Horn-Hill*, but says (*ibidem inventas*), which (*ibidem*) refers to the parish, and not to the close; 1st, because *Horn-Hill* was the plaintiff's soil, so that the defendant could not impound the plaintiff's sheep in the plaintiff's soil: 2dly, *ibidem* is always referred to the vill, that the venue may come from thence, which cannot come out of a close. But the Court thought this an idle traverse, and would have been surplusage on a general demurrer; but being upon a special demurrer, it vitiates the plea. *Ld. Raym. Rep.* 121. Mich. 8 W. 3. *Nevil v. Packman*.

2 Lutw.
1447. NE-
VILL v.
PECKHAM,
S. C. with
the excep-
tions and
answers, and
some observ-
ations of the
reporter;
but I do not
observe any
thing said by
the Court.

(L. b) Trespas. Prohibited or punished by Statute. [576]

1. 43 Eliz. ENACTS, That if any lewd person shall cut, or unlawfully take away any corn or grain growing, or rob any orchards or gardens, or break or cut any hedge, pales, rails, or fence, or dig or pull up, or take up any fruit-tree or trees in any orchard, garden,

It was ob-
jected to a
conviction
upon this
statute, 1st,

That the defendant was styled gentleman, and a gentleman was not within the statute, which speaks of vagabonds and such base people, and inflicts a base punishment, viz. whipping, which the law did never intend for a gentleman. 2dly, That the conviction

garden, or elsewhere, to the intent to take and carry away the same, or shall cut or spoil any woods or underwoods, poles or trees standing (not being felony); Juob offenders, their procurers or receivers, knowing the same, being convicted by confession, or one witness, before one justice of peace, mayor, or other head officer, shall make such satisfaction to the party, and within such time as such justice or head officer shall appoint; and if such offender shall not be thought able or sufficient to make satisfaction as aforesaid, then the said justice shall commit the offender to the constable to be whipped; and for every future offence shall also receive the same punishment of whipping.

And if any constable do refuse, by himself or some other, to execute the said punishment, he shall be committed to the common gaol until the said offender be punished as aforesaid.

Provided that no justice of peace do execute this statute for any offence done to himself, unless he be associated with one or more justice of peace not concerned in the matter.

is uncertain, for want of shewing the number of trees. Per Curiam, as to the first, whether the defendant be a gentleman or not, is not material; for if a man of quality will do a base or mean thing, there is no reason or justice why he should be exempted from the punishment: the quality of the offender is rather an aggravation than a lessening of the offence. To the second, the number as well as the nature of the trees should be expressed, for this is like an action of trespass in this respect, that the plaintiff is to recover damages, of which the number and nature of the trees is to be the measure; and if an action of trespass shall hereafter be brought for these trees, this conviction ought to be a plea in bar. Salk. 181, 182, pl. 2. Trin. 2 Ann. B. R. the Queen v. Barnaby.

2. 21 Jac. 1. cap. 16. enacts, that in cases of involuntary trespass tender of amends may be pleaded in bar. See Tender (S) and the notes there.

As to what punishments shall be inflicted, and what costs and damages shall be recovered in prosecutions and actions of trespass, see tit. Damages and Costs, tit. Game (A), and Tit. Woods.

For more of Trespass in general, see Actions, Common Disputes, Nuisance, and other proper titles.

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